TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 690.

THE UNITED STATES, PETITIONER,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 630.

THE UNITED STATES, PETITIONER,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

0 Original.

Transcript of record. United States Circuit Court of Appeals, Eighth Circuit. No. 3892. Chicago, Burlington and Quincy Railroad Company, plaintiff in error, vs. The United States of America, defendant in error. In error to the District Court of the United States for the Western District of Misouri. Filed November 29, 1912.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September term, 1913, of said court, before the honorable William C. Hook and the honorable John E. Carland, circuit judges, and the honorable Charles F. Amidon, district judge.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-ninth day of November, A. D. 1912, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the Western District of Missouri was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the Chicago, Burlington and Quincy Railroad Company is plaintiff in error and the United States of America is defendant in error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 *Citation.*

UNITED STATES OF AMERICA, *set:*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri, sixty days from and after the date this citation bears date, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States within and for the Western Division of the Western District of Missouri in the case wherein the Chicago, Burlington & Quincy Railroad Company is plaintiff in error and you are the defendant in error to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the honorable Arba S. Van Valkenburgh, judge of the District Court of the United States for the Western Division of the Western District of Missouri, this 30th day of September, 1912.

ARBA S. VAN VALKENBURGH, *Judge.*

I hereby acknowledge due service of the above and foregoing citation this 30th day of September, 1912.

LESLIE J. LYONS,
United States District Attorney for
Western Division of the Western District of Missouri.

Filed in the District Court on Sept. 30, 1912.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of
2 *the District Court of the United States for the Western Division of the Western District of Missouri, greeting:*

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the April term, 1912, thereof, between the United States of America and the Chicago, Burlington and Quincy Railroad Company, a manifest error hath happened, to the great damage of the said the Chicago, Burlington and Quincy Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record of proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit on or before the 29th day of November, 1912, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, this 30th day of September, 1912.

Issued at office in Kansas City, with the seal of the United States District Court, this 30th day of September, 1912.

[Seal U. S. District Court, Western Division West. Dist. Missouri.]

JOHN B. WARNER,
Clerk of United States District Court for the
Western Division of the Western District of Missouri.

Allowed this 30th day of September, 1912.

ARBA S. VAN VALKENBURGH, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals a duly
3 certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said District Court, at office, in the city of Kansas City, in said district, this 27th day of November, A. D. 1912.

[Seal U. S. District Court Western Division West. Dist. Missouri.]

JOHN B. WARNER,
Clerk United States District Court.

Filed in the District Court on Sept. 30, 1912.

Pleas before the honorable Arba S. Van Valkenburgh, judge of the District Court of the United States for the Western District of Missouri.

UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on the 21st day of November, 1910, the following entry was made of record in the United States District Court for the Western Division of the Western District of Missouri, in the cause wherein the United States of America is plaintiff and Chicago, Burlington and Quincy Railroad Company is defendant:

UNITED STATES
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY. } No. 302.

This day comes Leslie J. Lyons, United States attorney, who prosecutes on behalf of the United States, and by leave of court files a petition herein against the Chicago, Burlington & Quincy Railway Company, defendant herein.

Said petition, filed on the 21st day of November, 1910, is in words and figures as follows, to wit:

Complaint.

In the District Court of the United States for the Western District of Missouri. Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, defendant. } No. ——.

Now comes the United States of America, by Leslie J. Lyons,
4 United States attorney for the Western District of Missouri, and brings this action on behalf of the United States against

the Chicago, Burlington & Quincy Railway Company, a corporation organized and doing business under the laws of the State of Illinois, and having an office and place of business at Kansas City in the State of Missouri; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said commission.

For a first cause of action plaintiff alleges that defendant is a common carrier engaged in interstate commerce by railroad in the State of Missouri.

Plaintiff further alleges that in violation of the act of Congress known as the safety-appliance act, approved March 2, 1893 (27 Statutes at Large, page 531) as amended by an act approved April 1, 1896 (29 Statutes at Large, page 85) as amended by an act approved March 2, 1903 (32 Statutes at Large, page 943), said defendant, on August 9, 1910, hauled on its line of railroad one car, to wit, A. T. & S. F. 19060, in a train engaged in the movement of interstate traffic, one car in said train, to wit, A. T. & S. F. 44081, containing cement consigned from a point in the State of Kansas to a point in the State of Montana.

Plaintiff further alleges that on said date defendant hauled said car, A. T. & S. F. 19060, as aforesaid from Kansas City in the State of Missouri in a northerly direction, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling chain being disconnected from the lock block, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety-appliance act, as amended by section 1 of the act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to the plaintiff in the sum of one hundred dollars.

For a second cause of action plaintiff alleges that defendant is a common carrier engaged in interstate commerce by railroad in the State of Missouri.

5 Plaintiff further alleges that, in violation of the act of Congress known as the safety-appliance act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an act approved April 1st, 1896 (29 Statutes at Large, 85), as amended by an act approved March 2, 1903 (32 Statutes at Large, 943), and as modified by an order of the Interstate Commerce Commission of November 15, 1905, which order was made in pursuance of the provisions and requirements of section 2 of the aforesaid amendment of March 2, 1903, and is in the words and figures following, to wit:

"It is ordered, That on and after August 1, 1906, on all railroads used in interstate commerce, whenever, as required by the safety-

appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 75 per centum of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the said 75 per centum shall have their brakes so used and operated."

—defendant on August 9, 1910, operated on its line of railroad one train, to wit, its own, a transfer train consisting of 42 cars, drawn by locomotive engine C., B. & Q. 1903, said train being one operated with power or train brakes and being one engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date, August 9, 1910, defendant operated said train as aforesaid in and about Harlem, in the State of Missouri, within the jurisdiction of this court, when only 9 cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train and when all the power-braked cars associated with said 9 cars did not have their brakes so used and operated, and when less 75 per centum of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said act of Congress as amended, defendant is liable to the plaintiff in the sum of one hundred dollars.

For a third cause of action plaintiff alleges that defendant is a common carrier engaged in interstate commerce by railroad in the State of Missouri.

Plaintiff further alleges that in violation of the act of Congress known as the safety-appliance act, approved March
6 2, 1893 (27 Statutes at Large, 531), as amended by an act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an act approved March 2, 1903 (32 Statutes at Large, 943), and as modified by an order of the Interstate Commerce Commission of November 15, 1905, which order was made in pursuance of the provisions and requirements of section 2 of the aforesaid amendment of March 2, 1903, and is in the words and figures following, to wit:

"It is ordered, That on and after August 1, 1906, on all railroads used in interstate commerce, whenever, as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 75 per centum of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the said 75 per centum shall have their brakes so used and operated."

—defendant on August 9, 1910, operated on its line of railroad one train, to wit, its own, a transfer train consisting of 36 cars, drawn by locomotive engine C., B. & Q. 3169, said train being one operated with power or train brakes and being one engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date, August 9, 1910, defendant operated said train as aforesaid in and about Harlem, in the State of Missouri, within the jurisdiction of this court, when only 10 cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train and when all the power-braked cars associated with said 10 cars did not have their brakes so used and operated, and when less than 75 per centum of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said act of Congress as amended, defendant is liable to the plaintiff in the sum of one hundred dollars.

For a fourth cause of action plaintiff alleges that defendant is a common carrier engaged in interstate commerce by railroad in the State of Missouri.

Plaintiff further alleges that in violation of the act of Congress known as the safety-appliance act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an act approved March
7 2, 1903 (32 Statutes at Large, 943), and as modified by an order of the Interstate Commerce Commission of November 15, 1905, which order was made in pursuance of the provisions and requirements of section 2 of the aforesaid amendment of March 2, 1903, and is in the words and figures following, to wit:

"It is ordered, That on and after August 1, 1906, on all railroads used in interstate commerce, whenever, as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 75 per centum of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the said 75 per centum shall have their brakes so used and operated."

—defendant on August 9, 1910, operated on its line of railroad one train, to wit, its own, a transfer train consisting of 39 cars, drawn by locomotive engine C. B. & Q. 3169, said train being one operated with power or train brakes and being one engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date, August 9, 1910, defendant operated said train as aforesaid in and about Kansas City in the State of Missouri within the jurisdiction of this court, when only 9 cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train and when all the power-braked cars associated with said 9 cars did not have their brakes so used and operated, and when less than 75 per centum of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said act of Congress as amended, defendant is liable to the plaintiff in the sum of one hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of four hundred dollars and its costs herein expended.

LESLIE J. LYONS,
United States Attorney.

Summons and marshal's return—Filed Nov. 23, 1910.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, ss:

The President of the United States of America to the marshal of the United States for the Western District of Missouri, greeting:

8 You are hereby commanded to summon the Chicago, Burlington & Quincy Railway Company, of the State of Missouri, and resident of the Western Division of the Western District thereof, to be and appear before the honorable District Court of the United States, in and for the Western Division of the Western District of Missouri, on the first day of the next term thereof, to be begun and holden at Kansas City, in said district, on the fourth Monday, the 24th day of April, 1911, next; then and there to answer the complaint of the United States of America as set forth in the petition filed in the office of the clerk of said court on the 21st day of November, A. D. 1910.

Witness the honorable Arba S. Van Valkenburgh, judge of the District Court of the United States for said division and district, this 21st day of November, A. D. 1910.

Issued at office in the city of Kansas City, in said district, under the seal of said District Court, the day and year last aforesaid.

HOWARD S. MCCREARY,
Clerk U. S. District Court,
By ELIZABETH LENTON,
Deputy Clerk.

MARSHAL'S RETURN.

UNITED STATES OF AMERICA,
Western Division, Western District of Missouri, ss:

I do hereby certify that I executed this writ by delivering a true copy of same, together with a duplicate copy of the petition in said cause to H. S. Jones, southwestern passenger agent of the Chicago, Burlington & Quincy Railroad Company, at the business office of said company at Kansas City, Missouri. President and other chief officers not being found in my district. All done in Jackson County in said division and district this 23rd day of November, 1910.

Marshal's fees $2.00.

A. J. MARTIN,
United States Marshal,
By J. E. MORRISON,
Deputy.

Answer—Filed in the District Court on April 24, 1911.

Now comes the defendant in the above-entitled cause, and for its answer to the complaint herein, and each and every count thereof, states:

For its answer to the first count of the compiaint herein the defendant admits that at all of the times therein mentioned
9 it was, and now is, a railroad corporation, duly organized and existing according to law, but states that it denies each and every other allegation therein contained.

For its answer to the second count of said complaint the defendant admits that at all of the times therein mentioned it was, and now is, a railroad corporation duly organized and existing according to law, but denies each and every other allegation therein contained.

For its answer to the third count of said complaint the defendant admits that at all of the times therein mentioned it was, and now is, a railroad corporation duly organized and existing according to law, but states that it denies each and every other allegation therein contained.

For its answer to the fourth count of said complaint the defendant admits that at all of the times therein mentioned it was, and now is, a railroad corporation duly organized and existing according to law, but denies each and every other allegation therein contained.

WARNER, DEAN, MCLEOD & TIMMONDS,
Attorneys for Defendant,
Chicago, Burlington & Quincy Railroad Co.

Jury impaneled.—Trial May 2, 1912.

This day comes Leslie J. Lyons, United States attorney, who prosecutes on behalf of the United States; also comes the defendant by its attorneys, Warner, Dean, McLeod, and Timmonds; thereupon the Government by leave of court amended its petition by interlineation. Defendant by leave of court filed its amended answer and to which the Government was granted leave to file a reply. Thereupon it is ordered that a jury come, to wit: Lloyd Flenniken, Wm. McWilliams, Preston B. Colson, Edward G. Bryan, James Hart, James F. Ferguson, William F. Smith, Jerry Brown, William Herrell, David T. Toomay, John W. McAnally, S. R. Humphrey, twelve good and lawful men who are duly impaneled and sworn to well and truly try the issues joined, thereupon evidence was heard on the part of the Government at the conclusion of which the defendant by its attorneys presents a demurrer to the evidence, which was by
10 the court overruled and to which ruling of the court the defendant by its attorneys excepts. Thereupon the hearing of evidence was resumed, and at the conclusion defendant by its attorney presents demurrers to counts 1, 2, 3, and 4 of the petition, all of which were by the court overruled, and to which rulings of the court

defendant excepts. Thereupon the hour of adjournment having arrived, further proceedings are continued until to-morrow morning.

Amended answer.—Filed in the district court on May 2, 1912.

Now comes the defendant in the above-entitled cause, and for its amended answer to the complaint herein, and to each and every count thereof, says:

For its answer to the first count of said complaint, defendant admits that at all the times therein mentioned it was, and now is, a railroad corporation duly organized and existing according to law; and admits that at all such times it was engaged in interstate commerce, in the State of Missouri, but says that it was at all such times also engaged in intrastate commerce and traffic in said State.

Further answering said first count, defendant denies each and every other allegation therein contained.

For further answer and defense to said count, defendant says that the uncoupling chain referred to in said count had been, and was, properly connected to and with the lock block therein referred to, and the fact that said chain had become disconnected from said lock block was first discovered after said car No. 19060 had arrived at and was in defendant's switch yards, known as "Murray Yards," when and where it was immediately again connected by defendant before said car was further hauled or moved.

For further answer to the second, third, and fourth counts of said complaint, defendant denies each and every allegation contained in each of said counts.

WARNER, DEAN, MCLEOD & TIMMONDS,
Attorneys for Defendant.

Trial May 3, 1912.—Verdict.

This day again come the parties to this cause, Leslie J. Lyons, United States attorney, and Philip J. Doherty, who prosecute on behalf of the United States; also comes the defendant, Chi-
11 cago, Burlington & Quincy Railroad Company, by its attorneys, Warner, Dean, McLeod & Timmonds. Thereupon arguments of counsel are made, thereupon the court issues peremptory instructions to the jury to return a verdict for the Government upon counts two, three, and four of the petition, and said jury after hearing the charge of the court upon the first count of the petition retire to consider what verdict they shall render in the premises.

Thereupon said jury, after due consideration, return into court the following verdict, to wit:

"We, the jury, find for the plaintiff on the issues in the first count of the petition herein.

"S. R. HUMPHREY, *Foreman.*

"We, the jury, find for the plaintiff on the issues in the second count of the petition herein.

"S. R. HUMPHREY, *Foreman.*

"We, the jury, find for the plaintiff on the issues in the third count of the petition herein.

"S. R. HUMPHREY, *Foreman.*

"We, the jury, find for the plaintiff on the issues in the fourth count of the petition herein.

"S. R. HUMPHREY, *Foreman.*"

Thereupon this case is continued for sentence.

Record entry of filing of motion for new trial, May 6, 1912.

This day comes the defendant, Chicago, Burlington & Quincy Railroad Company, by its attorneys, and files motion for new trial herein.

Motion for new trial.

Now comes the defendant in the above-entitled cause and moves the court to set aside the verdict of the jury and grant a new trial herein for the following reasons:

1. The court committed error in admitting immaterial, irrelevant, and incompetent testimony over defendant's objections and exceptions.

2. The court committed error in overruling each and every of defendant's demurrers as to the evidence under the first, second, third, and fourth counts, respectively, interposed at the close of all the evidence.

12 3. The court committed error in refusing to give defendant's peremptory instruction marked "Number 1," and in refusing to give defendant's instruction marked "Number 2," and in refusing to give defendant's instructions marked "Number 3," and in refusing to give defendant's instructions marked "Number 4"—all of which said instructions were peremptory in form, directing the jury to return a verdict in favor of defendant on each of the respective counts in the complaint.

4. The court committed error in refusing to give to the jury defendant's instructions marked "Number 5," "Number 6," "Number 7," and "Number 8," respectively.

5. The court committed error in instructing and charging the jury in each and every part of its said instructions and charge to which exceptions were duly taken and saved by defendant immediately after said charge had been made and before the jury retired to consider its verdict.

WARNER, DEAN, MCLEOD & TIMMONDS,
Attorneys for Defendant.

Judgment, July 22, 1912.

UNITED STATES *vs.* CHICAGO, BURLINGTON & QUINCY R. R. Co.	No. 302.

This day comes Leslie J. Lyons, United States attorney; also comes the defendant, by its attorneys, Warner, Dean, McLeod & Timmonds. Thereupon the court overrules the motion for a new trial heretofore filed herein. Thereupon the court, being fully advised in the premises, assesses a penalty against the Chicago, Burlington & Quincy Railroad Company of one hundred (100) dollars on each of the four counts in the petition, together with all costs of this action.

It is therefore considered ordered and adjudged by the court that the United States of America have and recover of the Chicago, Burlington & Quincy Railroad Company the sum of four hundred (400) dollars, together with all costs herein, and that execution issue therefor.

It is further ordered that the defendant be granted until October 1st next in which to file bill of exceptions, and, further, that the appeal bond be fixed in the sum of one thousand ($1,000) dollars.

13 *Order allowing writ of error, etc., Sept. 30, 1912.*

Now, on this day comes the defendant by its attorneys, Warner, Dean, McLeod & Timmonds, and presents to the court its bill of exceptions and asks the court that the same may be signed, sealed, allowed, and filed and made a part of the record in this cause.

Now, therefore, the court being satisfied that the bill of exceptions is true and correct doth sign, seal, and allow said bill of exceptions and orders that the same be filed and made a part of the record in this cause, which is accordingly done this 30th day of September, 1912.

Thereupon said defendant files its assignment of errors and its petition for writ of error and presents to the court its bond for supersedeas, which bond is approved by the court, and it is ordered that the same act as supersedeas herein and that it be filed and made a part of the record in this cause, which is accordingly done; whereupon a writ of error is allowed and a citation signed.

Bill of exceptions by defendant—Filed in the District Court on Sept. 30, 1912.

Be it remembered, that on the second day of May, 1912, this cause coming on to be heard before the honorable Arba S. Van Valkenburgh, judge of said court, and a jury duly impaneled, the plaintiff appearing by its attorneys, Messrs. P. J. Doherty and Hugh C. Smith, and the defendant appearing by its attorney, Hon. Henry

C. Timmonds, the following proceedings were had and entered of record on said day and the days hereinafter mentioned, to wit:

Thereupon, after opening statements of respective counsel, the witnesses were called, sworn, and called in the order hereinafter indicated.

Thereupon the plaintiff, to sustain the issues on its part, introduced evidence, oral and documentary, as follows, to wit:

GEORGE E. STARBIRD, a witness of lawful age, produced, sworn, and examined on the part of the Government, testified as follows:

Direct examination by Mr. DOHERTY:

Q. What is your full name?

A. George E. Starbird.

Q. What is your occupation?

14 A. Inspector of safety appliances for the Interstate Commerce Commission.

Q. How long have you been doing work as inspector?

A. Nine years.

Q. What was your occupation before you became an inspector for the Interstate Commerce Commission?

A. Railway employee and in the transportation department.

Q. For how many years?

A. About thirty years.

Q. On or about August 9, 1910, did you make any inspection of cars here in Kansas City, on the Chicago, Burlington & Quincy Railroad?

A. Yes, sir.

Q. Did you make an inspection of car A. T. S. F. 19060?

A. I refresh my recollection from notes and answer yes, made at the time.

Q. What was the condition of that car at the time you inspected it in the yards of the Chicago, Burlington & Quincy Railroad, at Kansas City, August 9, 1910?

A. As to the A end of the car I noted a defective coupler, inoperative on account of the lift chain being disconnected on the A end.

Q. What was the cause of that chain's being disconnected, if that was apparent?

A. The lower clevis and clevis pin connecting the chain to the lock block, that pin was missing.

Q. Will you explain to the jury how the bottom clevis, being missing, affected the operation of the coupler on that car?

A. The operating lever extending from the corner of the car, where the switchman with the train can operate the coupler by the use thereof, extends across to the center of the car and turns in that manner [indicating] over from the deadwood, and over the top of the coupler head, and from the arm—the lift arm of that lever, extending in that manner [indicating] there is a short chain, several inches or more in length—according to the make of coupler,

and it is connected through an eye into the arm of the lever with what we term a clevis, and that clevis has two irons, and the pin goes through there, with a cotter key, the lower end of that to the lock block, and the lower clevis and pin that should have been connected with the chain was missing, leaving nothing whatever, when you raised the arm of the lever at the corner of the car, to move or operate the lock block.

Q. How did that affect the uncoupling of the car?

A. That car, at that end, with the defective coupler, could not be operated without a man stepping in between the ends of the cars and taking hold of the head of the pin or lock block and lifting it with his hands.

15 Q. With the car in that condition, was there any way, from that side of the train, by which the car could be uncoupled without a man going between the ends of the cars?

A. No, sir.

Q. Now, what train was this car in?

A. Transfer train on the Chicago, Burlington & Quincy Railroad Company, hauled by C., B. & Q. engine 3169.

Q. Where was this car when you first observed it?

A. In the Twelfth Street yard—ten o'clock in the morning.

Q. Near what point?

A. About opposite the Chicago & Alton freight house, at Twelfth Street, about the middle of the house. On the Kansas side, or toward Kansas.

Q. When this train moved, or was hauled by this engine, 3169, did you go upon the train?

A. Yes.

Q. And will you tell us how and where the train proceeded?

A. Proceeded in a generally northerly direction, across the river, and was delivered in what is known as the Murry yards of the C., B. & Q. Railroad Company.

Q. How great a distance is that?

A. I should say it was—I am not familiar with the—not exactly familiar with the exact distance, but I should judge it is about four or five miles, between four and five miles, the route they take.

Q. In proceeding, as this train proceeded that day, did it go upon the main highway of the Chicago, Burlington & Quincy Railroad?

A. It occupied the main track after leaving Twelfth Street and passing the Union Depot, taking the same route as a passenger train—you would use that bridge, the Burlington bridge.

Q. For how long a distance would you estimate it proceeded on the main line of the C., B. & Q.?

A. Through the Union Depot, northerly, until they got into the yard tracks at Murry yard.

Q. What is your estimate of that distance?

A. I should say the main tracks, perhaps two or three miles, so far as occupation of the main tracks is concerned.

Q. This train was in a switching yard when you saw it first?
A. Yes, sir.
Q. Of which this car was a part?
A. Yes, in the Twelfth Street yard.
Q. It passed onto the main line two or three miles, and went to another switching yard?
A. Yes, sir.
Q. When you arrived at the Murry yards on that day, what did you do in relation to calling the attention of some official of the railroad to the defective condition of the car?
A. After the train had been delivered and put away on several tracks by the crew handling the train, I immediately got in
16 touch with the car inspector at that point—Mr. R. L. Holloway, and called his attention to the defect on this particular car, and he accompanied me, and he made the repair later to the car.
Q. Now, as to count two—how many cars were in this train, the train that had the defective car in it?
A. How many cars were in the train?
Q. Yes.
(Witness refers to notes.)
A. Thirty-nine cars.
Q. That is count four.
A. I understand you to say the same engine.
Q. 3169, hauled by 3169—I will proceed to count four, because it relates to that same train—we might as well finish the testimony as to that. At what time did that train leave the Kansas City Twelfth Street yards?
A. Count four?
Q. The 39-car train.
A. 10.30 a. m.
Q. How was that train made up?
A. It was a train of freight cars made up after they got the consist of the train, by initial and number; they carried no caboose.
Q. How many cars were there?
A. Thirty-nine.
Q. How many—were they all air cars, equipped for the use of air?
A. All power-brake cars, and equipped, so far as the hose and brake apparatus was concerned.
Q. How many of the cars in that train had the air brakes operative?
A. Ten cars next to the engine. The hose detached on the rear of the tenth car, the angle cock handle turned at that point on the rear of the tenth car from the engine.
Q. And there were twenty-nine cars in that train that did not have their air brakes used and operative?
A. Yes, sir.
Q. On that trip?

A. On that movement.

Q. Who was the conductor of that train?

A. John Deere.

Q. Did you make any examination of the train, to determine whether there was any interstate commerce in that train?

A. I did; yes, sir.

Q. What did you ascertain?

Mr. TIMMONDS. I object to any conclusion of the witness as to what constitutes interstate commerce. I do not object to their copies or waybills, but do object to the man reaching and giving his conclusion.

The COURT. I assume you must show this by giving testimony as to what interstate commerce was there, but if this is merely a shorter method of getting at what the waybill shows——

17 Mr. TIMMONDS (interrupting). His question indicated that maybe he was going to get an expression of an opinion.

Mr. DOHERTY. I was going to ask for the witness's statement of the substance of the waybills, as he saw them, not the conductor's notes. If Mr. Timmonds has the originals here, if there is any mistake anywhere, it can be easily corrected.

Mr. TIMMONDS. I brought them voluntarily. I told them yesterday we would have them here for their use. They are here. They can use them if they want them.

The COURT. I suppose he required some method as an identification of those cars—if the waybills are here, so the witness can show.

Mr. TIMMONDS. They are here.

The COURT. To show the contents of each car—what they had in them.

Q. What did you find as to the waybills in the hands of the conductor for the cars in this train?

A. Nothing as regards the hands of the conductor, but I have a copy of the billing received at the Murry yard from the yardmaster, Decker, of the consist of that train, as to the same car, or associated with this defective car in question.

Q. Will you state what the consist shows, so far as it relates to this particular car?

Mr. TIMMONDS. In the third and fourth counts there is no complaint about a defective car.

The COURT. I understand the fourth count is not founded on a defective car. The train that is concerned by the fourth count did contain, incidentally, this defective car. That is used as a mere means of identification.

Mr. TIMMONDS. I don't know whether they are going to take the position that the car in count number one was also in the string of cars involved in the fourth count or not.

Mr. DOHERTY. It was.

Mr. TIMMONDS. Here are the waybills the Government asked for. [Handing to counsel.]

Mr. DOHERTY. They correspond with what I said?

Mr. TIMMONDS. I think they do.

The COURT. If there is no dispute as to the waybills, it will shorten things a good deal.

18 Mr. TIMMONDS. These show two cars—counsel, I think, knows more about the railroad business than I do—if he can make them out—they show one carload of lumber, I think, billed to Bradford Kennedy Company, to Sharpsburg, Iowa. And one is billed to H. P. Gardner, sewer pipe from Kansas City to Havelock, Nebraska. I will let counsel make them out, read them, or construe them—as I say, I think he is right about it—and save time.

The COURT. They might be introduced, then, so far as necessary to identify them with this particular train. The witness can be interrogated as to what particular things he found.

Mr. TIMMONDS. I will admit they contained freight intended for other States.

The said copies of billing were then marked "Exhibit A" and "B," and are in words and figures as follows, to wit:

9, 20

31

A-9-12-250M.

BURLINGTON ROUTE.

EXHIBIT A.

Form 31.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

LINES EAST OF THE MISSOURI RIVER.

EAST

WAYBILL.

Series.	Number.
	2197

From Kansas City, Mo., to Havelock, Neb. Date, 8/8/10. Car int., O. Car No. 102429.

ROUTE.

Via Junction.	With.....R'y.	Via Junction.	With.....R'y.	Via Junction.	With.....R'y.
Via Junction.	With.....R'y.	Via Junction.	With.....R'y.	Via Junction.	With.....R'y.

Gross, tare, and net weight of carload freight to be entered in this space, where the car is weighed.

Tons .... Gross 29. Freight 14.

Show transfers below.

1	3
2	4

Weigh this car at ..... Marked capacity of car .....lbs.

Stop this car at ..... For.....

Instructions regarding icing, ventilation, etc.....

*When a through rate is used and the shipment is to be re-waybilled en route the subdivisions must be shown in the rate column in road order, noting opposite each proportion the initial of the road to which it accrues.

Full name of shipper, point of shipment, original car, connecting carrier and previous waybill reference.	Consignee, destination, marks, routing beyond destination of waybill.	No. of pkgs.	Articles and classification conditions (O. R., C. R., Rel., Gtd., etc.).	Weight.	Rate and authority.*	Freight.		Advances.		Prepaid.	
Dickey C. M. Co.											
526	H. C. Gardner.		Sewer pipe.	28000	7	17	36				
			COPY.								

Agents at junction stations receiving this waybill from connecting line must stamp in the spaces below in consecutive order the names of their stations and date upon which the waybill is received.

1	2	3	4			Agent at destination will stamp herein date received.
				Date.....	Date.....	
				Train No.	Train No.	
				Time	Time	
Stamp of junction forwarding agent.	Stamp of junction forwarding agent.	Stamp of jun tion forwarding agent.	Stamp of junction forwarding agent.	To be filled in by first conductor taking the car.	To be filled in by conductor leaving car at destination.	

UNITED STATES VS. C., B. & Q. R. R. CO. 17

PAGE BOUND VERTICAL IN BOOK

21

32

A-9-12-250M.

BURLINGTON ROUTE.

EXHIBIT B.

Form 31.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY } EAST

LINES EAST OF THE MISSOURI RIVER.

WAYBILL.

Series.	Number.
E.	1945.

From Kansas City to Sharpsburg Ia. Date, 8/8/10. Car Int., M. P. Car No. 26073.

ROUTE.

Via junction.	With.....R'y.	Via junction.	With.....R'y.	Via junction.	With.....R'y.
Via junction.	With.....R'y.	Via junction.	With.....R'y.	Via junction.	With.....R'y.

Gross, tare, and net weight of carload freight to be entered in this space, where the car is weighed.
Tex cot
863
322
441

Tons..... Gross 43. Freight 27.

Show transfers below.

1 | 3

2 | 4

Weigh this car at..... Marked capacity of car.....lbs.

Stop this car at..... For.....

Instructions regarding icing, ventilation, etc.....

* When a through rate is used and the shipment is to be re-waybilled en route the subdivisions must be shown in the rate column in road order, noting opposite each proportion the initial of the road to which it accrues.

Full name of shipper, point of shipment, original car, connecting carrier and previous waybill reference.	Consignee, destination, marks, routing beyond destination of waybill.	No. of pkgs.	Articles and classification conditions (O. R., C. R., Rel., Gtd., etc.)	Weight.	Rate and authority.*	Freight.		Advances.		Prepaid.	
M. P. 8/4 23147	Bradford Kennedy Co.										
Bivins, F. T. P. 7/20											
T. 255 V. C. L. B. T. Co.			Y. P. Lumber.	54100	20						
					85	45	90	108	20		
931			COPY.								

Agents at junction stations receiving this waybill from connecting line must stamp in the spaces below in consecutive order the names of their stations and date upon which the waybill is received.

1	2	3	4			Agent at destination will stamp herein date received.
Stamp of junction forwarding agent.	Stamp of junction forwarding agent.	Stamp of junction forwarding agent.	Stamp of junction forwarding agent.	Date..... Train No..... Time..... To be filled in by first conductor taking the car.	Date..... Train No..... Time..... To be filled in by conductor leaving car at destination.	

22 The COURT. What I want to understand is, is this admitted for all purposes, in so far as it may have any bearing upon any of these transfer trains?

Mr. TIMMONDS. I don't know which transfers these two cars were in, but we——

The COURT (interrupting). The witness can tell.

Mr. TIMMONDS. I don't know which one of the strings of cars this was in. I would like to know. Do you claim it was in the first, second, or third string of cars?

The COURT. Let the witness state from his notation.

The WITNESS. I have no way of knowing what billing they have, but——

Q. (Interrupting.) This train that had the defective car and was made up of thirty-nine cars, will you state what you found, as to the contents of the cars in that train?

A. According to the copies of the billing record made from the [——] in yardmaster's office, I have a record here, box car 102429, and the B end. It says "Sewer pipe from Dickey Clay Manufacturing Company, Kansas City, Missouri, consigned to H. C. Gardner, Havelock, Nebraska, Q way-bill 2197." I think it is a little blurred here—August 8, 1910, Kansas City, Missouri, to Havelock, Nebraska.

Q. Have you anything else of that train?

A. Yes, sir.

Q. Will you state what it was, what you found?

A. I have a record also of A. T. S. F. box 44081, cement, Iola, Kansas, to Montana, from Iola P. C. Company, to United Missouri River Power Company, Q waybill 729, August 6, 1910.

Mr. DOHERITY. We have not got that.

Mr. TIMMONDS. I object to any more conclusions of the witness and any secondary evidence. The waybills are the best evidence.

The COURT. Very well, the waybills will be relied upon, and the witness will take the waybills, and by comparison, will state what was contained in this particular train.

Q. Examine the second waybill.

Mr. TIMMONDS. I don't object to his testimony about these cars, but to his testifying about other cars about which there is no waybill.

A. This second waybill is dated the 8th, Sharpsburg—eighth month, eighth day, 1910, Missouri Pacific, twenty-six——

23 Q. (Interrupting). Examining that, see whether or not the same merchandise was in this train.

A. Lumber, to Sharpsburg, Iowa, to Bradford, Kennedy, Q waybill 1945, August 8, 1910.

Q. Is that waybill for that consist?

A. Yes, sir; and the other described is the other one.

Mr. TIMMONDS. I am willing to admit, on behalf of the company, that the cars referred to in those two waybills were in each and every one of the string of cars they say they were. I don't know which

one. If he will say the first, second, or third string, I don't care. But——

The COURT (interrupting). It is important it should be shown which string of cars they were in. These different strings constitute different counts in this charge. The two referred to, I understand, were in the string of thirty-nine cars.

Mr. DOHERTY. Yes, sir; the first from the Twelfth or Murry yard applies to the defective coupler, also to the movement of that train with a less per cent of air than required by law.

Mr. TIMMONDS. Which count?

Mr. DOHERTY. Thirty-nine cars is the fourth count; this drag was thirty-nine cars.

Mr. TIMMONDS. We will agree that the two bills of lading introduced in evidence refer to and cover the two cars which were in the drag or string of cars referred to in the fourth count of the complaint. I will agree that the car which the witness referred to was also in that string.

Q. Coming to the second count, on August 9, 1910, did you examine and inspect any transfer train about 12.15 p. m.?

A. Yes, sir; at the other side of the river, at the Murry yard.

Q. How many cars were in that transfer?

A. A train of forty-two cars.

Q. Were they all air equipped, with air brakes?

A. All power brake cars, equipped.

Q. Were you present when the train was made up and left Harlem?

A. I inspected it in the yard as made up, and before it left.

Q. Were you there when it left?

A. Yes, sir; at 11.15 I made the first inspection, went over the train, and the train left at 12.12 p. m.

Q. How many cars in that drag were there that had air brakes used and operated when the train moved out?

24 (Witness examines notes.)

A. Nine cars, as well as I can tell by these notes. Nine cars and the engine. I want to state that one of the ends making up this train was partially ahead of the engine, being pushed ahead of the engine in the movement from the Murry yard to this side and part of it in the rear of the engine, the head portion being pushed on arrival to the Hannibal yard. In other words, there was cars ahead and behind this engine.

Q. How far did it proceed on the main tracks in that condition?

A. The same as the previous movement, in the opposite direction, about.

Q. About two or three miles?

A. Yes.

Q. On and over the main track?

A. Until they reached or coming under the viaduct at this north end of the Union Depot they put that head end of the train ahead of the engine into the Hannibal yard.

Q. And took the rest of them where?

A. Coupled on and went down to the Santa Fe, down to the Twelfth Street yard, with the rear end of the train.

Q. I understand that the nine cars that did have air brakes used and operated in that transfer were immediately ahead of the engine, being pushed.

A. No, sir; immediately on the rear of the engine.

Q. Immediately on the rear of the engine?

A. Yes, sir.

Q. And how many cars were ahead of the engine, and how many in the rear of the engine?

(Witness examines notes.)

A. Ten cars of coal, I think this is, coupled in ahead of the engine—1903; that is the number of the engine, but no air hose were coupled up ahead of the engine.

Q. That is the automatic couplers you refer to as coupled up?

A. The ten cars ahead of the engine, the hose was not coupled at all, coupled onto the cars.

Q. The automatic couplers were coupled up on those ten cars?

A. The couplers; yes, sir.

Q. But the air hose was not coupled up?

A. Disconnected, no connection made.

Q. So that the air brakes on those cars were not used and operated?

A. They were not used and operated in the cut ahead of the engine.

Q. How many cars were there pulled behind the engine?

A. Thirty-two behind the engine—nine of them with the air cut in.

25 Q. That is, the air brakes used and operated?

A. The hose coupled on the first nine cars attached to the rear of the engine.

Q. These are the nine cars in that drag which had their air brakes used and operated?

A. Yes, sir.

Q. What is the name of the yard from which this train started?

A. Murry.

Q. How far away is that from the Union Station?

A. I should judge about three or four miles.

Q. And that is over the main line before you come to the yard?

A. Partially.

Q. It was a movement between yards, between the Murry yard on the north side of the river and what is known as the Hannibal & St. Joe Twelfth Street yard on this side?

A. A portion of the cars into one yard and a portion into the other yard.

Q. Coming to count three, on that same day, did you see a drag of cars drawn by locomotive 3169?

A. Yes, sir.

Q. How many cars were in that drag?
A. Thirty-six.
Q. Where did you see it first and when?
A. Harlem Station, Murry yard.
Q. At what hour of the day?
A. 12.25 p. m.
Q. August 9, 1910?
A. August 9, 1910.
Q. Did you see that train proceed on its way?
A. Yes, sir.
Q. Who was the conductor on that train?
A. The same conductor as took the first train over, John Deere.
Q. Of that thirty-six cars, how many had their air brakes used and operative?
A. It was cut in behind the end of the eleventh car behind the engine.
Q. We don't know what that means. Will you tell us how many cars had air brakes used and operated?
A. Eleven cars.
Q. Eleven cars had their air brakes used and operated?
A. No; there is only ten cars the air was used and operated on; but, as I stated, the air was cut in on the eleventh car.
Q. What does that mean?
A. The hose at the rear of the eleventh car was detached and the angle-cock handle was turned, thereby showing that is as far as the air was coupled up or could be used. I said the eleventh car, but there was only ten in operation. The seventh car from the rear of the engine was cut out and not working.
Q. The seventh car from the rear of the engine?
A. Was cut out, and that was inclusive in the eleven cars where the air hose was coupled up and the air working through that one car.

26 Q. What is the purpose of the operation of the air brakes, Mr. Starbird?
A. To control.
Mr. TIMMONDS. I object to the question unless it is material.
Q. All these three movements, without air, were they movements within a yard?
Mr. TIMMONDS. The defendant objects to the question for the reason it calls for a conclusion of the witness, as it has not been shown that the witness has any knowledge of what the yard limits are, or that he is qualified to give an opinion on the subject.
The COURT. He has already stated and defined certain yards; he said from yard to yard.
Mr. DOHERTY. He has named them, but has not defined them.
The COURT. I don't know what he knows about that. He may be interrogated about that.
Q. Was this a movement within a yard or was it a movement from one yard to another?

Mr. TIMMONDS. Defendant objects for the reason it calls for a conclusion and not for a fact and for the further reason the witness is not shown to know what the yard limits are.

The COURT. Objection sustained.

Q. As to count one—for a moment—was that a freight car?

A. A., T. & S. F. box 19060; yes, sir.

Q. Was it loaded?

A. Yes, sir.

Q. Do you know whether there was anything about that car to show where it was from or where it was consigned to?

Mr. TIMMONDS. I understand from the testimony so far that car A., T. & S. F. is not the car named in either of these waybills?

Mr. DOHERTY. No.

The WITNESS. No, sir; I haven't any record as to the billing on that Santa Fe car.

Q. You say you have nothing to show that?

A. I have no record of any billing on the Santa Fe car.

Cross-examination by Mr. TIMMONDS:

Q. Mr. Starbird, your testimony so far has related to a date in August, 1910?

A. August 9th; yes, sir.

27 Q. Have you any recollection of any matter pertaining to either of the cars, or the drags of cars, to which you have been referring, except—I mean independent of the memoranda which you have there in your pocket—I mean have you independent memory of those things?

A. I have now, after I have refreshed my recollection on the occurrences that I made note of at that time; yes, sir.

Q. You do that by looking at the little book you have?

A. Certainly, from notes made at the time.

Q. Except for that, you would have no recollection about any of these things?

A. No.

Q. You made some memoranda, didn't you, of these matters, about that time, or notes of them, other than this little book you have here?

A. I made my notes in this book at that time, with reference to these cars in question, or trains in question.

Q. Do you remember who was with you, if anybody, at the time you say you found this uncoupling chain in the condition in which you say you found it down here in the yard—railroad yard?

A. Yes, sir.

Q. Who was with you?

A. My associate, Mr. E. L. Gibbs.

Q. He is engaged in the same work you are?

A. He was at that time.

Q. Where was the car standing when you noticed this chain—uncoupling chain—being loose?

A. As I stated, about midway, or opposite of the Burlington tracks, Twelfth Street yard, midway of the Chicago & Alton freight house.

Q. In the switch yard of the defendant company?

A. Yes, sir; if you wish, I can give you the very engine——

Q. (Interrupting.) No; it was in the switch yard of the defendant company?

A. It was on the lead, made up ready to go.

Q. It was in the switch yard of the defendant railroad company, in what is called the West Bottoms here?

A. What is known as one of the lead tracks, where trains are made up on; yes, sir.

Q. In the switch yard of the defendant company?

A. I presume you call them that.

Q. Would you?

A. It is the Burlington yard, certainly.

Q. In the switch yard. Do you know whether it was in the Burlington switch yard of the Burlington Railroad Company or not?

A. It was on the track.

Q. I am not asking you about any track.

A. And in the switch yard.

28 Q. Did you see any of the railroad employees or railroad men down there at that time, while you were down there in the switch yard of this defendant company?

A. Quite a number.

Q. You did?

A. Yes.

Q. Men handling the cars down there?

A. Switching around on the other tracks adjacent to where the train stood.

Q. Did you see this man, Deere, down there, the switch foreman?

A. Conductor on the engine?

Q. The switch foreman—that man Deere?

A. Switch foreman or conductor, it is the same thing—that is the man I saw.

Q. I don't care what you call him—I mean this man Deere—did you see him down there in the yard of the defendant company when you saw this chain loose?

A. I will not say I saw him at the time I discovered the chain loose.

Q. Was he down there in the yard either before or after you discovered it?

A. After, on the train, coming over.

Q. Did you see him in the yard before the car moved?

A. In the Twelfth Street yard I saw him about the train.

Q. You did see him about there. Did you tell him what you had discovered?

A. I did not.

Q. You stood by and saw that train—saw that car move—as you contend now in violation of law, without letting the man in charge of the train know it?

A. I simply state what I observed of the condition of the lock block.

Q. But you saw what you claimed to be a defect there and didn't let the man in charge of the car know it, did you?

A. I did not.

Q. Why not?

A. In charge of the train——

Q. (Interrupting.) Why not?

A. Because, in accordance with the instructions of the Interstate Commerce Commission, to aid in the observance of and carrying out of these laws, I am not authorized so to do.

Q. Then, you kept it secret from the man who had charge of the car?

A. No; I did not.

Q. It was a little matter to connect that chain, wasn't it?

A. Very simple.

Q. How quick could it be done?

A. How?

Q. How quick could it be done?

A. In two or three seconds, if you had the material there.

Q. If you had let the men in charge know what had been discovered, it could have been corrected before the car moved, all in two or three seconds' work?

29 A. I could not say whether it could or not. I don't know whether it would have been.

Q. It could have been?

A. Yes, sir.

Q. You say it was a simple matter.

A. Yes.

Q. Notwithstanding you discovered a condition that could have been remedied in two or three seconds, being a simple matter, you kept it secret from the men in charge of the train?

A. No, sir; because the men had charge of the train and had full opportunity to observe anything the same as I did.

Q. Do you know how long that car and chain had been in that condition?

A. No; except from the time I first observed it until I last observed it; had it fixed.

Q. Why was it you kept it secret from the men in charge of the train when you discovered it?

A. I say we are not instructed, when looking up conditions, to observe whether or not the railway corporations are easily observing the requirements of the law—we are not supposed to make ourselves known to any one employee, in any capacity.

Q. You noticed down there the car was about to be put in with some other cars and moved?

A. I knew the train was a transfer going across to the Murry yard.

Q. You knew it was a drag of cars which was going to go across the river, didn't you?

A. No; as I stated——

Q. (Interrupting.) You know that?

A. I stated I knew it.

Q. You knew it was not going to go out on any main line road, on any run?

A. I know it did go out, to that extent.

Q. To where it crossed the river. You knew it was going into the other switch yard, across the river, to be made up in a train?

A. Yes.

Q. And you allowed that to take place, that movement to take place? And kept it secret from the men who were there, and who could have had it fixed within two or three seconds?

A. Under instructions we had no discretion as to movement, but to observe what I saw done and report it.

Q. What was it you told them when you got into the north end yard?

A. There could not be any question of the defect being as I had described it.

Q. Was there any question about it as you described it?

A. I don't know of any.

Q. Would you be violating any of the rules of the Interstate Commerce Commission by telling them at one end of the yard rather than the other end?

A. I don't know as to that.

30 Q. Were not you just as free to tell Mr. Deere here in the south end yard, this side of the river, as you were to tell them on the north side of the river?

A. No, sir.

Q. Why?

A. Because we are not supposed to make inspection in that sense, for the railroad company. That is, there were inspectors there going over that train, in the Twelfth Street yard, in the employ of the C., B. & Q., and their duty was to discover such or similar defects.

Q. It was their duty to discover them whether you discovered them or not?

A. Yes, sir.

Q. Why did you tell them in the north-end yard when you could not tell them in the south end?

A. So as to have the repair made and verify the record I took by one of the employees where the car was delivered.

Q. Could you have had that done by Deere?

A. I could have had it done.

Q. Mr. Deere would be just as truthful a man as Mr. Holloway?

A. No question in my mind.

Q. If you had called attention to it?

A. I have so stated that.

Q. You could have done that?

A. Yes, sir.

Q. The car could have been hauled, and the chain could have been attached in two or three seconds before the car went across the river?

A. Yes.

Q. You tell the jury that as soon as you called attention to the fact that you discovered it loose at one end, it was broken in two, or loose——

A. (Interrupting.) I said the lower clevis and clevis pin were missing on the end of the chain.

Q. The chain was not broken—the clevis had fallen out; is that it?

A. Was missing.

Q. All you had to do was put in another clevis, was all?

A. Yes, sir.

Q. As soon as you called attention to it, after it got across the river, and before it went out onto the road, the clevis was supplied?

A. I have stated before the repair was made by Mr. Holloway in my presence.

Q. There is such a thing as you referred to in your testimony awhile ago, and as counsel for the Government several times referred to—a drag—what do you railroad men mean, in railroad parlance, when you say a "drag of cars"?

A. A number of cars attached to a road or switch engine, hauled by a road engine, temporarily used in yard service, or one or more cars attached to that engine, leaving a terminal yard of the
31 company, going in any general direction whatsoever, and cars attached to that engine destined to a yard of the same company or a connecting line, or along the main line of the company, doing industrial work, where cars in that drag separately would be sent out.

Q. Is that what they were engaged in doing?

A. No, sir; they did not set out nothing—it was a transfer train or drag, as usually termed, a continuous movement from the Twelfth Street yard over to the Murry yard, which is known as the train yard, and trains are made up.

Q. Have you acquired sufficient knowledge to be able to tell whether, in the operation of these drags, they are used—that is the term used when engaged in the process of switching, isn't it?

A. No, sir.

Q. It would make no difference whether switching or not?

A. No, sir; you have got to make it up into a transfer train or drag before it constitutes a train.

Q. Was this a drag?

A. It was a train made up to leave the Twelfth Street yard, destined to the Murry yard.

Q. As counsel for the Government referred to drag several times I want to know whether you say it was a drag?

A. I call it a transfer train.

Q. Was it a drag?

A. They drug it?

Q. You used the word "drag;" I want to know now whether you say, as an expert, it was a drag?

A. Both ways, a transfer, drag, or cut of cars.

Q. These cars I have been talking about, you tell the jury it was, in railroad parlance, known as a drag, a transfer, or a cut of cars?

A. Yes, sir; various [appel--ations] used.

Q. And you know, don't you, that the drag or transfer or cut of cars, and all those drags, transfers, or cuts of cars to which you have been testifying were being taken, if they were taken across the river, north, were taken over there for the purpose of being put into trains to be sent out over the road?

A. Yes, sir.

Q. And you know that any one of the transfers, drags, or cuts of cars to which you have been testifying, which came from the north side to the south side, was being brought over, had been picked up from the yard on the north side of the river, where the trains had come in, and down there, from the different trains, and brought to the south side for the purpose of distribution to other roads or to the merchants?

A. Yes.

Q. That is what the railroad company was engaged in doing with these drags or transfers the day you have been testifying about?

A. Yes, sir.

Q. And they were all in charge, at least two of them, in charge of this same man Deere?

A. Yes, sir.

Q. And he is called the foreman of a switching crew?

32 A. Both ways——

Q. (Interrupting.) (Question repeated.)

A. Yes, sir; foreman.

Q. He was in charge of the switching crew?

A. Yes, sir; transfer switching crew.

Q. Transfer switching crew, all right. You knew that all that time, didn't you?

A. Yes, sir.

Q. You understood then, and you understand now, that neither one of the drags or transfers or cut of cars to which you have made any reference in your testimony was a train of cars made up to be transferred or run onto any railroad, in its then condition?

A. No, sir; I do not.

Q. You don't know whether it was or not?

A. I don't know as you have stated, but I do know the cars in that, made up in that train, were destined—I have got the destinations where they were intended to go.

Q. The bills show there were two cars to go to some other State?

A. I know the cars, the destination of them was not Murry yard or was not the Hannibal & St. Joe Twelfth Street yard.

Q. You did not—you either did not understand me, or you are not disposed to answer, I don't know which. You know, and knew then, that there was neither one of those drags or cuts of cars, or transfers, that you have been referring to, as made up at the time you saw it, was not intended to go out over any railroad, except as being moved from one side of the river to the other, between what we call the switch yard, by the switch crews.

A. That is what I have been testifying to and so stated.

Q. All right. And you knew that any movement of that kind, of these drags, that was going from the south side of the river to the north side of the river, was to take them over to the Murry yard, there to be shifted about, from track to track and switch to switch, to make up trains going different directions, and put them into the trains to which they might belong?

A. Yes, sir.

Q. You tell the jury, Mr. Starbird, that the distance is four or five miles?

A. I said "about."

Q. Well, you meant——

A. (Interrupting.) I stated I was not familiar enough with the exact distance to be positive as to whether it is three miles and a half or three-quarters or four miles—I said about.

Q. Or five?

A. Or five, but from the Twelfth Street yard to the Murry yard, at the other end where this train was, and I went with it, I should judge it is about three miles—three or four miles, I should say, possibly five.

33 Q. Don't you know that that track you refer to, that single track, going across the river on the bridge, is only 3,000 feet long by actual measurement?

A. I don't know what is the exact distance of that track on that bridge by actual measurement or have no knowledge whatever of the tracks in that regard.

Q. There is only one track on the bridge, isn't there?

A. So far as I know.

Q. And that track is the track which is used, must necessarily be used, in the railroad business in making up and moving the drags about which you have been talking in order to get from one yard to the other; that is true, isn't it?

A. So far as I know.

Q. You know, don't you, there is no other way for the railroad company to use or handle these drags, in the switching of them by the switching crews when they go to make them up into trains or when they move on this side for distribution to the different railroad companies, except over that particular track?

A. I have stated that so far as I know——

Q. (Interrupting.) That is true, isn't it?

A. It is the truth so far as I know.

Q. You don't know anything to the contrary?

A. No; when it is the truth, that settles it, doesn't it?

Q. You don't know where the switch-yards limits are, do you, on the north and south side?

A. I know, generally speaking.

Q. Have you ever seen the limits?

A. I have seen the signboard, but can not locate them at the present moment. I have not been over to the Murry yard since that time, August 9, 1910. They might have moved that.

Q. Do you know where the north limits of the switch yard were at that time?

A. The north end, outbound trains?

Q. Or switch yard, north switch yard, on the north side of the river.

A. I know how far they extend. I should judge possibly a mile or a mile and a half.

Q. Do you know?

A. I don't know positively.

Q. Do you know where the south limits were?

A. I say I don't know positively. I had no business ascertaining just the yard limits, the board, or anything of that kind. That was no concern of mine to know that.

Q. As I understand from you and from the Government's counsel here, this chain you are talking about, and which is
34 made one complaint in the first count here, that was on a car which was in the drag or cut of cars referred to in the fourth count.

A. Yes, sir.

Q. So that there are two charges against the railroad company involved in that particular drag.

A. In the movement of that train.

Q. One is because we had a chain loose, clevis out, slipped out, and the other because the cars were not coupled up, the air not coupled?

A. The air not coupled up.

Q. So far as the air on those drags, and all of them, to which you refer in your testimony, is concerned, the air and the hose and all the appliances on those cars were in good condition, weren't they?

A. No, sir.

Q. What was the matter with them?

A. Several, I think, in a defective condition. You could not operate the power brake. The cars were cut out. To explain to you, it comes through the pipe from the train line to that cylinder and reservoir, where that air works through, when the engineer applies the brake. They become defective; then they cut them out; the angle cock, when you turn it parallel with the pipe, that puts

the car out of business as a power-brake car and renders the car totally inoperative and practically a nonair car.

Q. I understand, but the point I am trying to get from you is this, that on all the cars contained in the chain of the cars to which you have testified there was an air hose?

A. Yes, sir.

Q. Connected to the engine?

A. No; not connected to the engine.

Q. What do you mean by that?

A. The hose connected with the engine, sir, is the only car attached to the engine.

Q. It reaches to the engine; has to?

A. The car next to the engine.

Q. So the complaint is that the cars—not that the cars did not have appliances; they did have them—but did not have enough coupled up?

A. They did not use them. They were to use. They did not use them.

Q. They were there to use?

A. And could have been used.

Q. And could have been used?

A. But they did not use them.

Q. But had only eight or ten cars in each drag coupled up with the air?

A. That is so.

Q. By turning the cock the air would have run farther down?

35 A. By coupling up the balance, the rear car could have had the per cent of air on it they are required by law to have, and been in the clear.

Q. We will leave the court to talk about the law. Your complaint is not that the appliances on any of these cars were defective, outside of what you talk about the chain, but that the hose were there and the air couplings all in order, but because they failed to turn the cock which would let the air run into the other cars—enough of them.

Mr. SMITH. What the contention is will be determined by the pleadings in the case.

The COURT. He is bringing out the physical condition of the different cars.

Q. That is a fact, isn't it?

A. I have stated the hose was all there, but——

Q. (Interrupting.) Was in good condition?

A. The hose, yes, sir, but several cars; in all those others there is no question that the power brake cars were in the good condition I have noticed.

Q. But that is not the complaint of the Government in any of these cases.

A. But not enough of them.

Q. There would have been enough by the turning of the cock?

A. By coupling the hose.

Q. You say the turning of the cock would have coupled the hose, and the air would have run along underneath along the hose line for a sufficient number of cars?

A. They could have had them all with one or two exceptions, would have had sufficient.

Q. You knew and know now that these different drags which were made up, whether made up on the north side of the river or on the south side of the river, were picked up car at a time, a car here and a car there and a car over yonder and in different parts of the yard, in order to make a drag to move it from one side to the other?

A. They pick them up.

Q. That is the way it is done?

A. Yes, sir.

Q. A car on the switch track here and another here, the other switch track, and make it up that way?

A. Yes, sir.

(Witness excused.)

ELBRIDGE L. GIBBS, a witness of lawful age, produced, sworn, and examined on the part of the Government, testified as follows:

Direct examination by Mr. DOHERTY:

Q. What is you full name?

A. Elbridge L. Gibbs.

36 Q. What is your occupation?

A. Inspector of locomotive boilers.

Q. On August 9, 1910, what was your occupation?

A. Inspector of safety appliances for the Interstate Commerce Commission.

Q. How long had you been at that time inspector of the Interstate Commerce Commission, inspector of safety appliances?

A. Between four and five years.

Q. What had been your occupation before that?

A. Locomotive engineer and road foreman of equipment.

Q. For how many years have you been engaged in railroading?

A. Twenty-three years.

Q. You have had experience in railroading, generally?

A. Yes, sir.

Q. On the 9th of August, 1910, did you visit the yard south of the Twelfth Street viaduct at Kansas City, Missouri, on the C., B. & Q. Railroad?

A. I did.

Q. And you examined car A., T. & S. F. 19060?

A. I did.

Q. Did you find its condition to be defective, in that the bottom clevis was missing, and the coupler was thereby made inoperative?

A. I found the bottom clevis missing on the A end of that car.

Q. It was in transfer train 3169?

A. Transfer 3169.

Q. What was the effect of that missing clevis as to the operation of the uncoupling apparatus of the car?

A. It made that car inoperative—that coupler inoperative on that end of that car without the necessity of men going between the cars and uncoupling it.

Q. How is that; I didn't understand?

A. It made that particular coupler defective, so it could not be operated without the necessity of the men going between the cars.

Q. Did you see that car hauled or moved?

A. I did. I rode on the same train.

Q. That was in transfer train 3169?

A. Yes, sir.

Q. Where did it go?

A. To the Murry yard, across the river, at Harlem. I believe they call it.

Q. What would you estimate the distance to be?

A. I really don't know—a couple of miles. I should judge, from this yard into the position in which we pulled down the main line and back down into the yard—probably over two miles, but I really don't know. I have never had a time card to know.

Q. Was the route taken by that car over the main line track of the C., B. & Q. Railroad Company?

37 A. Yes, sir. This bridge is used by different roads over the main line of this defendant company, as I understand.

Q. Used for passenger trains and freight, so far as you know?

A. Yes, sir.

Q. By more than one railroad?

A. By more than one railroad; yes, sir.

Q. And defendant's main line of track?

A. Yes, sir; I judge it to be so.

Q. When you arrived at Harlem, did you call anyone's attention to that defect?

A. Inspector Starbird went down to the lower end of the yard and got an inspector, who said his name was Holloway. This man repaired that defect, but if I remember right I did not stay on the scene at the time of the repairing, but was there when he came back; he came up there.

Q. What did you observe as to the condition of the air on that train?

A. They did not have all the air coupled up.

Q. How many cars were there in the train?

Mr. TIMMONDS. If satisfactory to counsel for the Government, we will admit that, so far as the coupling of the air is concerned, the testimony of this witness will corroborate the testimony of the other witness and will be the same as to that. We will offer no evidence to dispute it.

The COURT. I think you can do that.

Mr. DOHERTY. I will endeavor to do that. That applies to all three counts?

Mr. TIMMONDS. Yes, sir; so far as air is concerned. As to the number of cars in the different drags and the coupling of the air, and the number of cars equipped with air, we offer no evidence to dispute it.

Q. As to this train, from the time it started from the freight yard in which it was put together to the time it reached another yard, was there any switching of it?

A. None until it reached the other yard. They were delayed for awhile on the bridge. I don't know how long, but lay there for some little time.

Q. They were drawn as a unit over the main line?

A. Yes, sir.

Q. From one yard to another?

A. Yes, sir.

Q. All trains are made up somewhere in the particular yard and go over the main line, and are distributed at some other particular yard, aren't they?

A. All trains have to be made up before they go somewhere.

38 Q. That is what is known among railroad men as transfer trains?

A. Yes, sir; we have a lot of different names for them, but transfer drag is a very common name used.

Cross-examination by Mr. TIMMONDS:

Q. "Transfer drag" is the usual term among railroad men?

A. It is a very common term.

Q. It is the usual term, and sometimes called transfer cuts?

A. Yes, sir.

Q. You understand, don't you, Mr. Gibbs, did understand at the time of making the inspection, that these transfer drags about which you and the other inspector have been testifying, were not going on the road at the times you saw them?

A. Destined to go out on the road?

Q. Yes, as made up.

A. No; we didn't understand it—we understood they were going from one yard to the other.

Q. And they were either assembled from different switch tracks on the south side of the river or assembled from different switch tracks on the north side of the river, to be taken to those switch yards either from the north or south side?

A. From experience, I know that is the method commonly used.

Q. You speak as a railroad man?

A. Yes, sir.

Q. And you understand that where either of these drags was made up, in the north yard, across the river, that it was simply the assembling or getting together of cars which had come off the main lines in trains to pick them up and bring them over to the south side

of the river for distribution into the switch yard down here, to the different roads?

A. That is what occurred.

Q. Or set for the merchants, set for unloading?

A. Yes, sir; set.

Q. And, on the other hand, if a drag was made up on the south side of the river, the cars were picked up from the different switch yards in the same way and taken to the north side of the river into the switch yard and there distributed into the trains for which they might be intended?

A. I would say that would be the method in which they would be handled.

Q. The only thing, I understand, of which you as Government inspectors make complaint, or the Government in this case makes complaint, is that you found car A. T. S. F. had the little clevis missing from the uncoupling chain.

A. Yes, sir; we discovered that defect.

Q. What is the size of that clevis?

29 A. They vary in length, probably a clevis anywhere from four inches down to two and one-half inches—maybe a little longer than that. It depends on how many holes.

Q. They run from two and one-half to four inches long?

A. Yes, sir.

Q. You discovered one missing?

A. Yes, sir.

Q. In what part o fthe drag cars was that car when it went across the bridge?

A. I haven't got the numbers in station order, all those cars, but it would be my impression it was very close to the engine.

Q. It was not the end car?

A. No; it probably was several car lengths from the engine.

Q. You did not call the attention of anybody connected with the railroad company to the fact that the clevis had dropped out or was missing?

A. No, sir; no, sir.

Q. You don't know how long it had been missing?

A. Not until I first saw it.

Q. You knew the drag was being made up to be taken across the river to the north yard?

A. Yes, sir.

Q. You knew, if you had occasion to do it, it was a matter that could have been remedied, another clevis slipped in in two or three seconds, in the yard where you discovered it?

A. My knowledge of railroad men is that they would protect the company if they could, providing they had a specific case called to their attention.

Q. I don't care about that, but if you had called the attention of any of the railroad men down there, in connection with this train,

to the fact that there was a little clevis slipped out, there could have been another clevis slipped in before the car had moved?

A. If I had called any of the crew's attention to it, their knowing me so well, they would have done it.

Q. They would have done it?

A. Yes, sir.

Q. And would have done it before the car was moved out?

A. Undoubtedly, if I had told them.

Q. Why didn't you tell them?

A. Because I could not establish a case; and we had been doing this time and time and again before.

Q. Because you could not establish a case?

A. No, sir.

Q. You mean the foreman in charge would not tell the truth?

A. I don't want to argue my point of view.

Q. That is not what you mean?

A. No; no—the men would tell the truth, undoubtedly.

Mr. DOHERITY. The witness can explain it.

40 A. (The witness continuing.) There is a difference between inspection and taking violations. Our instructions on violations are not to notify or go to the general foreman of the car department or the master car builder or master mechanic, and take him down and point out defects, as we were out to do the inspecting, and which has been done time and again. When taking violations, we have to establish the case. We have to see this move, and therefore we would not have established a case.

Q. You wanted to stand by and see a thing done which you could have prevented, and by your silence encouraged them to do what you thought would be a violation of the law?

A. I stood by and took a note of the violation. We stood there for a violation.

Q. If you had called his attention to it there would have been no violation?

A. Not at that time, probably.

Q. These cars, in these different drags you have been referring to, all had automatic couplers on?

A. Oh, yes.

Q. This car, where this clevis had slipped out, had an automatic coupler on both ends?

A. Yes, sir; it had.

Q. And the other cars had automatic couplers at both ends, with levers?

A. Yes.

Q. Now, those automatic couplers couple by impact, don't they?

A. Yes, sir.

Q. That is, where the cars are shoved up together, the automatic coupler slips—one part slips into the other and makes the coupling?

A. Yes, sir.

Q. With this clevis there, just as you found it, if the next car to it had been shoved up to it, they would have coupled by impact anyhow?

A. Yes.

Q. All right. Now, then, and with it gone, they could have been uncoupled by using the lever of the connecting car?

A. We have nothing to do with the other car.

Q. Answer the question, that is true?

A. We had nothing to do with the other car. Undoubtedly, on the other side of the train.

Q. Notwithstanding this clevis was missing, the cars could have been coupled by impact, and could have been uncoupled by the use of the lever on the connecting car next to it? Answer the question.

A. Oh, yes, sir.

Q. I am talking about this particular car.

A. No; we would uncouple the car attached to this car; would not have to uncouple the defective car.

Q. I want you to answer the question. Notwithstanding the chain, or any part you refer to as being missing there, you tell the jury that the cars, by being brought together, would have coupled automatically by impact?

A. Yes, sir.

41 Q. And notwithstanding that condition, they could have been uncoupled by the use of the lever of the connecting car?

A. Undoubtedly.

The COURT. On the same side of the car or on the other side?

The WITNESS. The other side of the car.

Q. But on the same ends, where the ends come together?

A. Yes, sir.

Q. There is an automatic coupler and a lever at each end of every one of the cars?

A. Yes, sir.

Q. And that could have been done by the using of the lever on the connecting car without the necessity of a man going in and lifting it with his fingers?

A. If he was on that side of the train, he could do that, but of its own mechanism he could not do it on this car.

Q. But if on that side where the lever was, this absence of this clevis would not interefere?

A. No; there would be nothing to interfere with its use over there.

Q. And if on this side, he could have gone to that lever; gone to the other side and used it?

A. He could have gone around or over if he wanted to take that trouble or endanger himself in that way.

Q. If he wanted to, he could get a ladder or climb over the car; it could have been done, without the necessity of going between, by the use of the lever?

A. Yes, sir; if he wanted to walk around or over it.

(Witness excused.)

Mr. TIMMONDS. Will you admit that the other inspector will testify the same way regarding the coupling or uncoupling as this man has?

Mr. DOHERTY. You had better call him on that.

(Noon recess.)

Mr. SMITH. We desire to offer in evidence waybill number 2197 for car initialled Q, 102429, and waybill number 1945 for car initialled MP, number 26073, being the waybills for the cars mentioned by the witness heretofore.

The COURT. The same referred to this morning?

Mr. SMITH. Yes; by the witnesses this morning.

(The said exhibits marked "A" and "B," respectively, are set forth herein.)

42 GEORGE E. STARBIRD, recalled for further cross-examination by Mr. Timmonds, testified as follows:

Q. Mr. Starbird, I understand that the cars in these drags or transfers, to which you made reference in your testimony this morning, were all equipped with automatic car couplers?

A. Yes, sir.

Q. Those car couplers couple by—automatically by what we call impact?

A. Yes.

Q. That is, by coming together; the cars come together?

A. Yes, sir.

Q. Now, notwithstanding this chain may have been disconnected from the lock block, as charged in the complaint here, and as you found it, you say that coupling could yet be made by that impact; could be coupled with other cars by impact of the cars?

A. Another car could couple on it by impact.

Q. And it could couple on it; they could couple together by impact?

A. If the coupler on the other car was in working condition, open; yes, sir.

Q. And notwithstanding that condition, they could be uncoupled by the use of the lever on the other car at that same connection?

A. By the man going around, or under or over, and using the operating lever on the other car; yes, sir.

Q. I mean on the end of the car where the coupling is made that could be done, notwithstanding the chain was in the condition you found it?

A. By using the lever on the other car that was operative.

Q. That could be done, then, and the only inconvenience resulting, in order to uncouple it, would be that, if the railroad employee did not happen to be on that other side of the train, he would have to get over there to utilize it?

A. Over, around, or under it.

Q. And he could do either of those things without the necessity of going in between to uncouple them with his hands?

A. The only way he could do it would be to go around.

Q. Or get over the car?

A. He would have to go between; if he went in or over the coupler or under, he would have to go between.

Q. I mean if he was already on that side, he could uncouple by the use of the lever on the adjoining car?

A. If he was on that side of the train.

Q. If not on that side, he could still uncouple those with the chain in the condition you say you found it by going to that side of the car and using that lever?

43 A. He could pull the coupler operative but could not pull the coupler in question.

Q. I understand that he could pull it, but I mean by that operation he could uncouple the cars.

A. Certainly, by using the coupler that was operative, just the same as if he could use this coupler that was inoperative.

(Witness excused.)

Mr. DOHERTY. If your honor please, the Government rests.

Mr. TIMMONDS. At the close of the case by the Government, the defendant desires to and does introduce a demurrer to the evidence as applied to the first count in the complaint only. I concede that, under the law, I have got to introduce evidence under the other three counts, but I don't know that the Government has made a case for us.

The COURT. I understand the demurrer is based on your questions to the last few witnesses?

Mr. TIMMONDS. Not only on that, but two clauses in there, you will notice.

The COURT. The demurrer will be overruled.

Mr. TIMMONDS. To which action and ruling of the court in overruling said demurrer the defendant now excepts.

Mr. DOHERTY. That is our case.

TESTIMONY FOR DEFENDANT.

Thereupon the defendant, to sustain the issues upon its part, offered and introduced the following testimony and evidence:

J. S. GORMAN, a witness called on behalf of the defendant, testified as follows:

Direct examination by Mr. TIMMONDS:

Q. Mr. Gorman, where do you reside?

A. Kansas City, Kansas.

Q. In what are you engaged—what work?

A. Car inspector.

Q. For the Chicago, Burlington & Quincy Railroad Company?

A. Yes.

Q. How long have you been engaged in that business?

A. About ten years.

Q. How long have you been engaged in the railroad business all together?

44 A. About the same length of time.

Q. In order to shorten the case I will get right down to the point, unless counsel objects. Does your business as an inspector require you to inspect cars in the yards of the Burlington, the defendant railroad company, when received from other companies?

A. Yes, sir.

Q. Did you hear the testimony of the Government's witnesses regarding a certain Santa Fe car number 19060?

A. Yes, sir.

Q. Which your company, or the defendant company, was handling in its switch yards here on the 9th of August, 1910?

A. Yes, sir.

Q. That bore the initials A. T. S. F., so the Government witnesses say, that indicates, does it, that that car was a car belonging to the Santa Fe Railroad Company?

A. Yes, sir.

Q. Did the Santa Fe Railroad Company bring that car to the yards of the Burlington Railroad Company?

A. Yes, sir.

Q. And turn it over there in the yards?

A. Yes, sir.

Q. Now, do your duties, as inspector, require you to inspect cars of other railroads, which are brought into the yards of the defendant railroad company, before they are received by the railroad company, the defendant, or did at that time?

A. We inspect them when we deliver them. If they are O. K. and perfect so far as the safety appliances are concerned, we receive them—if not we send them back.

Q. Did you inspect, on the 9th of August, this particular car in question here—Santa Fe car 19060—referred to?

A. Yes, sir.

Mr. DOHERTY. The Government objects to going into that aspect of the matter unless the defendant company intends to question the fact of the defect at the time of the hauling by the defendant railroad. It strikes me it is entirely irrelevant and immaterial what inspection was made of this car previous to the time of the existence of the defect. The question at issue is was there a defect in its safety appliances when hauled by the defendant railroad, and the fact that reasonable care and diligence, or due inspection was made, is, as I understand it under the decision of the Supreme Court of the United States, recently made in the case of C., B. & Q. Railroad Company against the United States, entirely eliminated as a factor in these cases.

45 Mr. TIMMONDS. The defendant takes the position that the jury is not bound to believe the testimony of the two inspectors—Government inspectors.

The COURT. You mean as to whether it was actually defective?

Mr. TIMMONDS. Yes, your honor.

Mr. DOHERTY. On that issue, if that is disputed, it is not admissible for any purpose, because the decisions that I think counsel are going to ask the court to instruct the jury on—because the Supreme Court, in the Taylor case, said that they must appeal to Congress, not to the court, for a modification of the stringent rules which the courts had been applying; and acting on that suggestion, they did appeal to Congress. Congress modified this very law, and that modification was in effect when this case arose. The act of April, 1910, and all the decisions on which counsel rely are cases prior to the passage of that statute.

The COURT. I would like to have that shown to me—that amendment. There is no use having evidence admitted if it should not be. On the other hand, I think it wise that I should see that particular section on that special proposition. I am not going to rule on it until I have seen the section. As to the other part of it, I will——

Mr. TIMMONDS (interrupting). Your honor, page 299, volume 36.

Mr. DOHERTY. That has absolutely no application to the facts in this case.

Mr. TIMMONDS. In order that the court may read that statute, when it comes to that, and have the benefit of my understanding of it, and the reason why I ask leave to ask this particular question, you will find that says that if anything is in good condition—that is the gist of it. That is a fact which I want to prove by the witness; that he inspected it and it was in condition. It is necessary for us to prove that to get the benefit of this statute.

Mr. DOHERTY. The state of facts referred to in the proviso in section four would have no application to a case like this, where the railroad contends the defect did not exist, because that is a right given them after they discover the car to be defective, to move it under certain circumstances for the purpose of repair. And

46 how the railroad company can contend in one breath a car was not defective and in the other breath that they moved a defective car for the purpose of repairing it, it seems to me to be so inconsistent it is not tenable.

Mr. TIMMONDS. We make no such contention.

The COURT. From the announcement of counsel he desires to introduce testimony for one purpose, anyway, for which it will be competent to meet the contention that the car was out of order at all. You may ask the question; but if you desire for me to rule on the other proposition, I want to see what the law is on that first.

Q. Did you—when this car was recievd from the Santa Fe did you inspect this particular car in the line of your duty?

A. Yes, sir.

Q. State whether at that time and before the car was moved across the river you found this uncoupling chain, to which witnesses have referred, properly connected to the lock block.

A. Yes, sir.

Q. It was properly connected at that inspection?

A. Yes, sir.

Q. How long was the inspection made before the car was moved across the river, if you can recollect?

A. I don't know what time the car was taken across the river.

Q. These Government witnesses say it was taken across about 10.25—something like that; they say their books show it went across about then.

A. We made the inspection of that car, I think, at 3.30 p. m.

Q. The day you received it?

A. On the day we received it.

Q. On the 8th?

A. Yes, sir.

Q. At that inspection there was nothing wrong with this uncoupling chain or pin?

Mr. DOHERTY. The Government objects to the form of the question.

A. No, sir.

Q. In making those inspections do you keep a record of your inspection at the time you make the inspection of the different cars?

A. Yes, sir.

Q. Who was with you, if anybody, at the time you made this inspection?

A. Another inspector by the name of Tom Burke.

Q. Did you make a record of the inspection of this car at the time you made the inspection?

A. Yes, sir.

The COURT. When was that inspection made?

47 Mr. TIMMONDS. The evening before.

Q. That is when it came into the yards, from the Santa Fe Company?

A. Yes, sir.

Q. Have you got that record with you, which you made at that time?

A. Yes, sir.

Q. Where it is—please produce it.

(The witness here leaves the stand and gets record.)

Q. Is it a part of your business, as a car inspector, to make a record of every inspection you make?

A. Yes, sir.

Q. Now, what sort of a record did you make at the time, does your record show, which you made at that time, in 1910, with reference to this Santa Fe car?

A. 19060, A. T. S. F. box, load; 8/4/1910, M. C. B., B. ends hose coupled.

Q. Now, you have read the record entry which you made at that time, have you?

A. Not all of it.

Q. Go on.

A. End truss rod gone, B. end; three corner boards broke, A. end.

Q. Now, then, where there is anything wrong in a car, in making inspections, you note it in your records?

A. Yes, sir.

Q. If this chain had been detached at that time, would your record have shown it?

A. Yes, sir.

Q. Or, if the pin—if the clevis had been missing, that would have been noted in your record at that time?

A. Yes, sir.

Q. In other words, everything that is perfect or in good condition, or nothing that is imperfect or in good condition is ever noted on the record?

A. No, sir.

Q. As I understand, you did not find anything wrong with this chain or clevis?

A. I will say we had to make a note of the air hose; that is all right, but that is——

Q. (Interrupting.) Special work?

A. Yes, sir.

Q. But, as applied to the coupling apparatus, if there is anything there, do you note it, if there is anything wrong that you found?

A. Yes, sir.

Q. If there had been anything of that kind wrong at this time it would have been recorded and reported?

A. Yes, sir.

Q. You say there was nothing wrong?

A. No, sir.

Cross-examination by Mr. DOHERTY:

Q. Mr. Gorman, these cars are inspected by the railroad which makes the transfer to your road, are they not?

A. No, sir.

Q. They are not, at this point?

A. No, sir.

48 Q. And you receive cars in interchange that are deefctive, do you, without inspection, from the other roads?

A. We do not receive them if defective; that is, the safety appliances.

Q. You have no inspection by the other road at the time they are turned over to you?

A. No, sir; not that I know of.

Q. And the only inspection is the inspection which you make?

A. Yes, sir.

Q. And you go through the yard, when a train of cars comes in, one man on one side and the other man on the other, and you walk along and observe if there are any defects, do you?

A. Yes, sir.

Q. You found some defects in this particular car, did you?

A. Yes, sir.

Q. Did those indicate that car had been through some hard usage?

A. No; slight damage.

Q. Now, will you state again—I could not quite hear you—just what the condition of that car was, as you found it?

A. Daamge—the damage to the car, I believe, was one end truss rod gone.

Q. One end truss rod gone?

A. Three corner side boards broke; old.

Q. Broken—what is that?

A. Old—old damage.

Q. Old damage, old defect?

A. Yes.

Q. That was at three o'clock on the afternoon of the 8th, was it?

A. Yes, sir, 3.30.

Q. Now, was that car moved anywhere in order to repair those defects, which were admitted to exist there in the car?

A. No, sir.

Q. From 3.30 p. m., on the 8th, until ten o'clock the next morning, do you know anything about what transfers were made of this car?

A. No, sir.

Q. For aught you know, it may have been shifted about in the yard?

A. Yes, sir.

Q. If it came in the Santa Fe train, it was delivered to your road, the cars in that train would be taken out of that train and put into other trains, according to the proper destination of them, would they?

A. Yes, sir.

Q. After the delivery to you—and that would require some shifting about in the yard, would it?

A. Yes; I guess it would.

Q. Now, when shifting about in the yards it is possible for a break to occur, such as has been described by the Government witnesses in this case?

A. You say could a break have occurred?

Q. Yes; in that way?

A. Yes, sir.

49 Q. And it also is possible that, you think, in making an inspection of a train, that a defect in that coupler might be overlooked—it is possible, isn't it?

A. Yes; it is possible in the lock, you could not see the lock, but a fellow looking at all could not miss the pin if the lift chain broke.

Q. That is, if he had made an observation between those cars?

A. Yes, sir.

Q. It does sometimes happen those things get by, don't they, by the inspector?

A. I don't know whether they do.

Q. Don't you know they sometimes get by?

A. No, sir; I don't know that.

Q. You don't know of any case where an inspection has failed to discover a defect of that kind in the car?

A. I could not swear I did.

Q. Now, how many trains do you inspect there in a day?

A. I could not say—probably average a hundred cars or more.

Q. That would be only three or four trains?

A. Yes, sir.

Q. Aren't there more than three or four coming in each day?

A. Yes, sir.

Q. Then, you inspect more than one hundred cars, don't you?

A. Oh, there are several other inspectors besides me there.

Q. Now, how many inspectors are there there?

A. Four.

Q. Four inspectors—how many trains a day come in there?

A. I could not say.

Q. On an average.

A. I could not say how many regular trains—they sometimes run extras.

Q. On an average, about how many trains?

A. I suppose six or eight trains a day.

Q. Six or eight trains a day—not more than that?

A. Regular trains.

Q. I am not talking about regular trains—I mean regulars and extras.

A. I could not say.

Q. You can not give us any idea?

A. I believe five regular trains come in, but——

Q. (Interrupting.) I mean on an average—how many trains in all come in there; can't you give us any idea?

A. No, sir; I can not.

Q. You are there on duty every day?

A. Yes, sir.

Q. And you can not give us an idea on an average how many trains come in there?

A. No, sir; I can not.

Q. How many cars, on an average, do you inspect in a day?

A. Probably about one hundred.

50 Q. In a day?

A. Yes, sir.

Q. Are you a repair man?

A. No, sir.
Q. Are there repair men kept at that point?
A. Yes, sir.
Q. That is the repair point?
A. Yes, sir.
Q. You have facilities there for making repairs?
A. Yes, sir.
Q. You have particular facilities for making safety-appliance repairs there?
A. Yes, sir.

Redirect examination by Mr. TIMMONDS:

Q. This little chain they talk about was in plain view, wasn't it; it was not hidden by anything?
A. No, sir; it was not.
Q. So, if one end became disconnected it would be perfectly apparent?
A. Yes, sir.
Q. You would not have to search for it, but just as soon as you raised it you would see it?
A. Yes, sir.
Q. You spoke about discovering, however, and making a record of the fact that there was an old break on the side of the car somewhere.
A. Yes, sir; three corner side boards.
Q. Where is that?
A. On the corner of the car.
Q. Up somewhere, or where—does it have anything to do—does it have anything to do with the safety appliances of the train?
A. No, sir.
Q. It hasn't anything to do with them?
A. No, sir.
Q. And the other thing you found and remarked about, what was that—that was the only thing you found and noted?
A. That is the only thing.
Q. Anyhow, that old place you found, it looked like where the car—the plank in the car had been struck sometime, but it was an old matter?
A. Yes, sir.
Q. And whether it was old or new would have no effect on any of the safety appliances of the car?
A. No, sir.

Recross-examination by Mr. DOHERTY:

Q. That is not your orignal book which you took around through the yards, is it?
A. I don't carry that book, but that is the original sheet I took that transfer on. They take the sheets and paste them in a book at the office.

Q. You did not keep a record book and then transfer it into the interchange report?
A. No, sir.
Q. You do not carry the book through the yards?
A. Carry that, a single sheet.
Q. A single sheet, and make notes on the single sheet?
A. We make two carbon copies of it, carry a sheet.

51 By Mr. TIMMONDS:

Q. This is your handwriting?
A. Yes, sir.
Q. Made at the time?
A. Yes, sir.

By Mr. DOHERITY:

Q. Outside of that, have you any personal recollection of that car at all?
A. No, sir.

By Mr. TIMMONDS:

Q. When you turn the sheets in, you have a number of sheets; you fill them up and turn them into the offices?
A. Yes, sir; turn our sheets in every morning.
Q. And that is what you did in this case?
A. Yes, sir.
Q. That is the sheet you turned into the office of the railroad company the next morning?
A. Yes, sir.
(Witness excused.)

THOMAS BURKE, a witness of lawful age, produced, sworn, and examined on the part of the defendant, testified as follows:

Direct examination by Mr. TIMMONDS:

Q. You were the other railroad inspector referred to by Mr. Gorman in his testimony just now?
A. Yes, sir.
Q. You were with him at the time the inspection to which he made reference on this Santa Fe car was made?
A. Yes, sir.
Q. How long have you been acting in that capacity, Mr. Burke?
A. About twelve or fifteen years.
Q. How long have you been in the railroad business?
A. About that length of time.
Q. Were you with Mr. Gorman at the time the inspection was made?
A. Yes, sir.
Q. Did you assist him in making the inspection?
A. Yes, sir.

Q. Now, if this chain they refer to—the Government witnesses refer to—had been disconnected at the time of making that inspection, would you have noticed it?

A. Yes, sir.

Q. That chain is in plain view?

A. Yes, sir.

Q. If it had been disconnected—one end had been disconnected—I understand the Government claims one end was disconnected. If one end had been disconnected from what they call the lock block, that would have been plainly apparent?

A. Yes, sir.

Q. Do you tell the jury that at the time you made the inspection it was not disconnected but was properly connected; was it at that time?

A. Yes, sir.

Q. Where a railroad car comes in from another company,
52 from one company to another, and upon inspection it is found to have defective safety appliances, the company to whom it is sent sends it back, refuses to take it and use it, do they, and send it back to the company from whom they got it?

A. Yes, sir.

Q. And that is the custom and has been for many years with all the companies, all the railroads, is it?

A. Yes, sir.

Q. Where a railroad sends into the yards of another road a car in a defective condition, so far as the safety appliances are concerned, that company does not receive it but sends it back for the company's inspection, and if you had found the safety appliances of this car in a dangerous condition, the Burlington would not have received it?

A. It would have sent it back?

Q. To the Santa Fe Company?

A. Yes, sir.

Q. And the Santa Fe Company would do the Burlington the same way?

A. Yes, sir.

Q. And all the other railroads do the same thing?

A. They do.

Cross-examination by Mr. Doherty:

Q. You inspected this car when it came in on the afternoon of the 8th?

A. Yes, sir.

Q. Do you remember about it?

A. I helped get the transfer.

Q. Do you have any recollection of this particular car?

A. No; not any more than the balance of the transfers.

Q. You inspect cars that come from other roads?

A. Yes, sir.

Q. Do you inspect cars that go out in transfer trains?

A. No.

Q. You do not inspect——

A. (Interrupting.) Not all the time.

Q. So you did not make an inspection of this train the next morning to ascertain what its condition was?

A. No, sir.

Q. And for aught you know, that chain may have been broken when that train started out the next morning—for anything you know?

A. Yes, sir.

(Witness excused.)

James Dunn, a witness of lawful age, produced, sworn, and examined on the part of the defendant, testified as follows:

Direct examination by Mr. Timmons:

Q. Mr. Dunn, you are the same man referred to by the Government inspector—or were you in here when they were testifying?

A. My name is Dunn.

33 Q. You were the foreman of the different forces that are referred to by them, going back and forth across the river here on the 9th of August, 1910? (No answer.) What business are you in?

A. Foreman, switch foreman, transportation department.

Q. What was your work on the 9th of August, 1910?

A. The same occupation.

Q. Switch foreman?

A. Yes, sir.

Q. What are the duties of a switch foreman and what were they on the 9th of August, 1910?

A. Such as breaking up trains and transfers and shifting them from one track to another.

Q. Do I understand that a switch foreman has charge of a switching crew?

A. Yes, sir.

Q. In making up the trains in the switch yards or dismembering trains in switch yards?

A. Yes, sir; and delivering cars to cars other connecting lines.

Q. Were you engaged in that work, in handling the drags of cars referred to to-day, on the 9th of August, 1910?

A. I have not got my books with me. I don't know whether I was handling that drag that day or not.

Q. Were you at work on that kind of work on the 9th of August, 1910?

A. Yes, sir.

Q. Did you at any time thereon, while you were handling or using any of those cars that day, any car on which the uncoupling chain had one end of the coupling chain detached from the link—discover anything of that kind?

A. No, sir.

Q. On any of the cars which you were handling that day?

A. No, sir.

Q. Was your attention called to the fact that the inspectors reported to Mr. Holloway over at the Murry yards that condition of affairs that day?

A. No, sir.

Q. Nothing was said to you about it by anybody?

A. No, sir.

Q. You did not see it yourself?

A. No, sir.

Q. Did you hear of it?

A. No, sir; I did not.

Q. So if they pointed it out to anybody, it was pointed out to somebody not handling the train, so far as you know?

A. Yes, sir.

Cross-examination by Mr. DOHERTY:

Q. Were you accustomed at that time to go on any of these trains from one point to another?

A. I never ride on any out of Kansas City unless a passenger train.

54 Mr. DOHERTY. You will have to talk louder.

A. I never went on a train out of Kansas City unless I was a passenger.

The COURT (addressing the witness). Speak more distinctly. It is almost impossible for me to hear, and I am sure the jury can not.

A. I say I never went out of Kansas City unless I was a passenger.

Q. Now, do you ride any of the drags across from one terminal to another, from one yard to another?

A. Yes, sir.

Q. Did you on this day, with the inspectors, ride two trains from one terminal to another—freight trains?

A. No; I didn't ride no freight trains.

Mr. TIMMONDS (addressing the witness). Talk louder.

A. No, sir.

Q. Did you ride any drags of cars made up in one yard to go to another yard with the inspectors in August, 1910?

A. I can not say.

Q. Do you know these two inspectors who testified here?

A. Yes, sir.

Q. You have seen them?

A. Yes, sir.

Q. You recognize them as the men—have you seen them before?

A. Yes; I am personally acquainted with them.

Q. You will not swear you did not ride with them on transfer trains across from one yard to another switch yard in August, 1910, will you?

A. Beg pardon.

Q. (Question repeated.) I mean on a transfer train with them from one yard here in Kansas City to another yard.

A. I can not say as to the date. I didn't know that there was any inspectors on the train; I didn't know it at the time.

Q. Did you ever ride a train with them?

A. To tell you the truth, no, not that I know of. They might have been on the train.

Q. Did they ever call your attention to the absence of air, a sufficient quantity of air, in a transfer train?

A. How do you mean, personally?

Q. Personally.

A. I had one inspector remark to me one morning—he asked me what instructions I had about using any air.

Q. I am confining myself to the two inspectors who appeared here, Mr. Starbird and Mr. Gibbs. I understood you to say you know them personally.

A. I thought you meant Tom Burke and Mr. Gorman.

55 Q. No; I mean Inspector Starbird—stand up. (Mr. Starbird does as requested.) And Mr. Gibbs. (Mr. Gibbs also rises.)

A. That gentleman there [pointing to one of the two gentlemen] is the man I think approached me on the air question.

Q. Did he call your attention to the fact that the trains going between these terminals did not have the required percentage of air—did he call your attention to that subject specially?

A. All he said, he asked me——

Q. (Interrupting.) Answer the question yes or no—did he call your attention to that subject?

A. He never said nothing about the percentage—he asked me what instructions I had on the air brakes.

Q. You told him what your instructions were?

A. That I had no instructions.

Q. That you had no instructions?

A. No.

Q. Did you ride any transfer train with these two inspectors?

A. No; not as I can testify and say I rode with them. That gentleman, I have seen him. I don't know as he rode the transfer or not, but I know he was over there at the time. The other gentleman, I don't think I seen him at all.

Q. He was over there—where do you mean?

A. The Twelfth Street yards.

Q. And he discussed with you the subject of air brakes?

A. Yes, sir; that is he made the remark if I had instructions about air.

Q. How are the waybills for those trains sent over, those transfer trains?

A. Sent over just to the office as soon as we get the report for what is going across the river, and the waybills are sent over there.

Q. The switching crew takes them over?

A. The switching crew takes them over sometimes, if they get them ready.

Q. Do you sometimes take them over?

A. Sometimes.

Q. Sometimes you ride the train and take them over yourselves?

A. Sometimes they are handed to me, and sometimes handed to some one of the crew.

Q. And you direct the switching crew in the same manner that the conductor directs the brakemen on a train?

A. That is my duty; yes, sir.

Q. And if there is no large number of these cars fitted up, having their air brakes used and operated, if it becomes necessary to stop those cars quickly, it is necessary for the switching crew to go to the top of the cars and operate the hand brakes, isn't it?

A. No, sir.

56 Q. In order to stop the cars quickly, and in an emergency, all cars not having their air brakes used and operative, wouldn't it be necessary for the men to operate the hand brakes in an emergency?

Mr. TIMMONDS. Objected to as immaterial.

(No ruling and no answer.)

Q. Sometimes you do go from the Twelfth Street yard to the Murry yard on these switch trains?

A. Yes, sir.

Q. And you return on switch trains from the Murry yard to the terminal here in Kansas City, do you?

A. Not on the trains; on a switch drag.

Q. Switch drag—and that is one or more cars drawn by an engine upon a railroad, isn't it?

A. Yes, sir.

Q. That is what you call a switch drag?

A. Yes, sir.

Q. And how far is it from the Twelfth Street yard to the Murry yard?

A. About a mile and a half, or a mile and three-quarters.

Q. And that mile and three-quarters is over the main line of the C., B. & Q. Railroad?

A. Why, I don't know as it is called the main line or not; I always called it the yard limit.

Q. The bridge and all?

A. Yes, sir.

Q. And passenger trains coming over there?

A. Yes, sir.

Q. Of how many roads?

A. The Burlington operates the track, and I called it the Burlington yards.

Q. How many roads run passenger trains over that line of track?

A. I don't know myself, to be truthful with you.

Q. How many roads do you know that run passenger trains over that line of track?

A. The Burlington is all I can say.

Q. You have no knowledge that any other railroad uses that track?

A. I don't know, of my own personal knowledge, but I can not say what other roads run over.

Q. Did you ever see the Rock Island run over it?

A. Yes, sir.

Q. You have seen the Wabash trains run over it?

A. Yes, sir.

Q. And Rock Island passenger trains?

A. Yes, sir.

Q. And Wabash passenger trains?

A. Yes, sir.

Q. And the freight trains of both of those roads?

A. Yes, sir; I have seen freight trains run over it.

Q. And freight trains of the C., B. & Q.?

57 A. Yes, sir.

Q. A single track, is it?

A. The bridge is single track.

Q. How long is that?

A. Supposed to be about three thousand feet—I don't know just exactly how long the Missouri River bridge is.

Q. How many years did you say you had been working around the terminal here?

A. Since 1906.

Q. About six years?

A. Yes, sir.

Q. And every day you have worked there, haven't you seen those other railroads using that line?

A. No, sir.

Q. You have not?

A. No, sir; because I did not work in that end of the yard all the time.

Q. You, as a railroad man, had some doubts as to what railroad used that track, did you, when you were asked the question, however, a moment ago?

A. No, sir.

Q. You didn't have any doubts?

A. I have no doubts about anything.

Q. You——

A. (Interrupting.) I could not say how many trains or different roads used that.

Q. But you know what different roads use it?

A. Yes, sir.

Q. Do you know any more roads using it, that come in over that line, using that bridge?

A. The roads I named, the Wabash, Rock Island, and Burlington.
Q. You don't know whether any others use that bridge?
A. The Q. O. & K. C., and that is the Burlington.
Q. Q. O. & K. C.; that is four railroads that use that bridge.
A. So far as I know.
Q. And those tracks?
A. Yes, sir.

Redirect examination by Mr. TIMMONDS:

Q. I notice that you used the expression "switch drag."
A. Yes, sir.
Q. As well as counsel for the Government. Is that the term known among railroad men generally as applied to these strings of cars about which you and the Government witnesses have been testifying?
A. How do you mean?
Q. Is that the name of it, a drag?
A. I call it a switch drag.
Q. Is that the name recognized almost universally or generally by railroad men, or what other name, if any other names, have you?
58 A. Murry drags is what we call them, going to the Murry yard.
Q. That means going to the switch yard there?
A. Yes, sir.
Q. Cars used in that way, are they known among railroad men as a drag or cut or transfer of cars?
A. As a drag—Murry drag.
(Witness excused.)

R. L. HOLLOWAY, a witness of lawful age, produced, sworn, and examined on the part of the defendant, testified as follows:

Direct examination by Mr. TIMMONDS:

Q. What is your name?
A. R. L. Holloway.
Q. Where do you live?
A. Kansas City.
Q. What is your business?
A. I am a car inspector—that is, in the road service.
Q. For what company?
A. C., B. & Q.
Q. How long have you held that position?
A. Off and on I have been with the company eleven years last April.
Q. Were you inspector for that company on the 9th of August, 1910?
A. Yes, sir.
Q. Do you recall the instance referred to by the Government's witnesses—you were present when they testified, were you?

A. Yes, sir.

Q. Do you recall the instance of one of those inspectors calling your attention to a car, over in the switch yards, referred to as the Murry yard, with one end of a chain uncoupled; chain loose from the lock block?

A. Yes.

Q. Where were you when he called your attention to that?

A. That was by what we call our office, a little house up in the middle yards, next to the ice house.

Q. In the switch yards over there?

A. Yes.

Q. When he called your attention to it, what did you do?

A. I went with him down there and put a clevis on the car.

Q. He and you went down to where the car was—where was the car at that time?

A. That car was in what we call D. yard, south part of the D. yard.

Q. Were you where it was stopped when it came into the yard from the south side of the bridge?

A. Yes, sir; at that time they went down in the Harlem—what they call the Harlem yards, the engine faced east and backed up, and as soon as they get into the clear, in south, into the yard, as a usual thing they cut off there.

Q. Had it been cut off?

59 A. Yes; the engine was loose from it at that time.

Q. The engine had been cut off?

A. Yes.

Q. The car had been standing down there in the yards?

A. Yes, sir.

Q. You and the inspector went down there, and you attached a clevis to the detached end of the chain?

A. Yes.

Q. How was that made—how is the chain attached to the clevis that was missing?

A. How was it attached?

Q. Yes; how long did it take you to put it in?

A. If I have it handy, it takes only a second or two.

Q. How do you attach the chain to it?

A. It was a clevis with a little pin running through; then you have a cotter key running through that and bent over that holds it back.

Q. That is all there was that had to be done?

A. Yes, sir; all I seen.

Q. Is that the first knowledge you had of that uncoupling chain having gotten loose from the clevis at one end?

A. Yes, sir.

Q. Do you know of anybody connected with the railroad company who had any knowledge of that chain—end chain—having gotten loose from the clevis before your attention was called to it?

A. No, sir.

Q. You were the first railroad man connected with the Burlington Railroad, so far as you know——

A. Yes, sir.

Q. Who learned of the fact?

A. Yes, sir.

Q. How is that end chain attached to the clevis?

A. End chain?

Q. Yes.

A. Solid links, welded together, and then the clevis made in a U shape with the hole in each end.

Q. All you have to do is to take it and put it through the end link and run the pin through it?

A. Yes, sir.

Q. Is the clevis what is sometimes known as the lock box (block)?

A. No, sir.

Q. What is the lock block?

A. That is what holds the knuckle in place.

Q. Is that the pin?

A. The pin, yes; operating pin.

Q. So the end chain lays over the lock block?

A. Yes, sir.

Q. That is the end that was loose?

A. Yes; the clevis come down, understand, usually about three links; come down from what we call the lift rod to the operating block, and the lower link was gone—the lower clevis.

Q. The clevis that went into the end link?

A. Into the lock block.

60 Q. And that is remedied by putting a clevis in through there and putting a pin in it?

A. Yes.

Cross-examination by Mr. DOHERTY:

Q. In the condition in which this car was when your attention was called to it—the missing clevis—that made it impossible to uncouple that car with the uncoupling lever of the car? Well, it would on that side.

Q. With the uncoupling lever of that car, I say, that car as it was built and as it was there, would it be possible to uncouple that car in the condition in which it was then, with the uncoupling lever of that car?

A. No, sir; the coupler would have to be coupled——

Q. (Interrupting.) Answer the question, "Yes" or "No."

A. I said it would be impossible the way it was standing, with the lift rod; yes.

Redirect examination by Mr. TIMMONDS:

Q. It takes two cars to make a coupling?

A. Yes, sir.

Mr. DOHERTY. I am talking about uncoupling.

Q. It takes two cars to uncouple, too?

A. Yes, sir; I think so.

Q. Since counsel for the Government has gone into that question, I will ask you this: If, notwithstanding that chain was in the condition it was in when the Government inspector called your attention to it, the coupling could not be made with that car and another car having an automatic coupler, simply by impact?

Mr. DOHERTY. I did not go into the question of coupling.

Q. Isn't it a fact that notwithstanding the chain had come loose, yet that car could be coupled to another car having an automatic coupler, by impact, by bringing them together?

A. It certainly could.

Q. Isn't it a fact that, notwithstanding that condition, they could be uncoupled after they had been coupled—could be uncoupled by the use of the lever on the other car—connecting car?

A. Yes, sir.

Q. And without anybody going between the cars to uncouple them?

A. Yes, sir.

61 Recross-examination by Mr. DOHERTY:

Q. What would a man have to do that was on that side of the car and it became necessary to uncouple that car; what would he have to do?

A. You mean where the lift rod was disconnected?

Q. Yes.

A. He could reach in with his hand and pull the operating pin in there.

Q. Go in between the cars?

A. Yes, sir.

Q. That is the most natural way in which it would be done?

Mr. TIMMONDS. Objected to as to what would be the most natural way.

The WITNESS. I could not say as to that.

The COURT. That is immaterial. That is a matter for argument.

Mr. TIMMONDS. For instruction of the court, too.

Redirect examination by Mr. TIMMONDS:

Q. Personally he could go in there and lift the pin, if the chain was in place, couldn't he? He could go in and lift that out with his hand, even if the chain had not become detached, couldn't he?

Mr. DOHERTY. Objected to.

The COURT. I don't think that is immaterial. I think, perhaps, it may have been called out by the Government.

Q. A man could go in and uncouple it—between the cars and uncouple it?

A. Yes, sir.

Q. And with the chain in the condition you found it, he could uncouple the cars without going between them at all by the use of the lever on the other car?

A. Yes, sir; on the other side.

Recross-examination by Mr. DOHERTY:

Q. What would he have to do to get to the lever on the other side of the car?

A. You mean how would he get to it?

Q. Yes, sir.

A. You could go around or on top.

Q. Around the train?

A. Yes, sir; owing to the number of cars you had.

Q. Around your train? And is that the only way he could do it?

62 A. If I understand you right, you mean the lift rod on the opposite side of the train?

Q. Yes; what would you have to do?

A. There are various ways of getting over there. Of course, it would be according to the number of cars that he had how far he would have to go; and if he wanted to go over, he would have to climb over the top or go under.

Q. Is there a ladder to go over the top?

A. Yes, sir.

Q. From the side?

A. Yes, sir.

Q. From the side of the car?

A. From the end and side, understand; on the right-hand side always is a ladder goes up over the top of the car.

Q. Where the uncoupling lever is?

A. Yes, sir.

Q. And a ladder on the other side to get down?

A. Yes, sir.

Q. And that, you say, is a means that could be used?

A. Yes, sir; you could use that.

Q. He would have to mount the top of the car?

A. There would be various ways to get over there.

Q. Describe what the various ways are.

A. I said it was owing to the number of cars, if he had to go around. He could get around the car, if there was only one car, or under the car or over the top of the car.

Q. Go under or over the top?

A. Yes, sir; or climb over the top, between the two couplers, and climb over the two couplers.

Q. Go in between the cars?

A. Yes, sir.

By Mr. TIMMONDS:

Q. There are four ways he could get to it?

A. Yes, sir; several ways.

Q. Without using his hands to couple or uncouple the cars?

A. Yes, sir.

(Witness excused.)

F. C. RICE, a witness of lawful age, produced, sworn, and examined on the part of the defendant, testified as follows:

Direct examination by Mr. TIMMONDS:

Q. Where do you reside?

A. Chicago.

Q. What is your present business or avocation?

A. I am general inspector of transportation for the Burlington system.

Q. How long have you been connected with the railroad business in any way?

A. I have been with the Burlington road without any cessation for forty-nine years the first day of the coming July; it will be forty-nine years.

63 Q. You have been connected with the Burlington Railroad Company, with the management, with the running of that company forty-nine years in the operating department of the company?

A. For forty-nine years the first of July.

Q. Are you in any way connected with what is known as the American Railway Association of the United States?

A. Yes, sir; the C., B. & Q. Railroad——

Q. (Interrupting.) You say you are?

A. I am.

Q. Explain to the jury what the American Railway Association is—how is the American Railway Association composed—what composes that American Railway Association?

A. It is composed, I think, of every interstate-commerce railroad in the United States.

Q. About how many of them are there?

A. 447.

Q. How long have you personally had connection with that American Railway Association?

A. Twenty years.

Q. You get that connection as a representative of the Burlington Railway Company, or this defendant railway company?

A. Yes.

Q. And every other railroad company in the United States engaged in interstate commerce is a member of the American Railway Association?

A. Has a representative of their company.

Q. Has a representative of their company?

A. Yes, sir.

Q. Constituting that association?

A. Yes, sir.

Q. Please explain to the jury the different positions you have held in connection with the railroad business during that forty-nine years.

A. I commenced with the Burlington Railroad in 1863 as a telegraph operator and clerk, and finally agent, and I was an employee

of the railroad company in three different railroad telegraph offices in train work.

Q. I understand all your forty-nine years have been devoted to some part of the operation department?

A. Yes; I was doing train work in the Commercial Telegraph, and in 1886 I was made train dispatcher of the Galesburg division, in Illinois, and I was train dispatcher for eight or nine years.

Q. Before you went to Galesburg, where were you?

A. Montana, a junction of the C., B. & Q., one of the most important offices of the Burlington at that time, and from that point I went to Galesburg as dispatcher and then division operator, then I was made chief train dispatcher, and then made train master, and then was made division superintendent, and then was made superintendent of the Illinois lines, comprising the Chicago division and the Galesburg division and St. Louis division; I was superintendent of the four Illinois divisions for fourteen years, and then
64 made general superintendent of the C., B. & Q., and from that I went to my present position.

Q. All during those forty-nine years have been in the advancement of the business?

A. Yes, sir.

Q. And do you attend the meetings and have you been attending the meetings of the American Railway Association?

A. I have been a constant attendant ever since I represented the Burlington road.

Q. How often do they meet?

A. The association meets twice a year, the committee.

Q. Now, from your knowledge of the railroad business, and especially the transportation part of the railroad business, do you know whether or not the word "train" as used in the railroad business has any fixed, definite, and technical meaning among railroad men, and in the railroad business, and especially the transportation business?

A. It has.

Mr. DOHERTY. I object to the question. I suppose the question here would be a question for the court, and that is the question of the meaning of the word "train" as used in the statute, and that whether or not the railroads may have a special meaning for that in railroading, may or may not give us light in the determining of the meaning of that word used in the statute. In other words, is it for determining whether the words of the statute are to be limited by the meaning given to the word used in the statute by this particular industry or whether it is general, whether it was used in the statute in its general application.

The COURT. I suppose that is a matter I shall have to pass upon as a matter of law. I will hear what the testimony is on that point.

Mr. TIMMONDS. I want to help advise the court as to what the law is on it.

Q. You say that the word "train," in railroad parlance, has a fixed, definite, and technical meaning?

A. Yes; it has.

Q. What is the meaning of the word "train," in railroad parlance, as applied to the railroad business?

A. A train is an engine, or more than one engine, coupled together with or without cars displaying markers.

Q. For how many years has that been the technical meaning of the word "train" in the railroad business, so far as you know?

A. It has been over fifteen years. I am not sure but it is twenty, I think twenty years.

Q. At least twenty years?

65 A. Yes: the established definition.

Q. Is that a definition given to that word by the American Railway Association?

A. It is.

Q. And that has been a definite meaning given to it by the American Railway Association for at least twenty years?

A. Yes, sir.

Mr. TIMMONDS. If your honor please, I don't know whether you are aware of it, but I call your attention now to the fact that in the safety-appliance act Congress recognizes the validity and existence of the American Railway Association and clothes it with certain powers: names it specially in the act, in the safety-appliance act.

The WITNESS. There is also a bill before Congress now pending which is drawn——

Mr. SMITH (interrupting). I object to the bill.

The COURT. Objection sustained.

Mr. SMITH. It seems to me that those upon whom this law was intended to operate should not be the persons who should determine as to whether or not the things that the statute provides certain equipment for bear certain names or not; that is a matter for Congress to determine and the court to construe.

The COURT. That is entirely a matter for the court to construe as to the meaning of the word "train." I will allow the testimony to go in.

Mr. TIMMONDS. I will show it is the duty of the court to give certain instructions to the jury, and it is the duty of the jury—I will show the correctness of the rule I am seeking to invoke in the argument.

The COURT. The meaning of the word "train" has already been defined by the courts, I take it.

Mr. TIMMONDS. We do not find it; do not find where a similar case has been up under this particular act but in other courts under different laws, and find it the duty of the railroad company, if a word has any other meaning than ordinary meaning, to show it by oral testimony.

Q. Were you present when the witnesses testified about this movement of those cars, the one referred to by some of them as drags across the bridge here?

A. I was.

66 Q. I will ask you to state to the jury whether either of those strings or drags of cars constituted a train, then.

Mr. Dennery. Objected to.

The Court. He can define what a train is; I think it would be no question for the jury to determine.

Q. I will ask you to state to the jury whether, in your opinion as a railroad man, based upon your experience, which you have already defined and explained, either of the drags or strings or transfers referred to by the different witnesses to-day constituted a train within the meaning of railroad parlance.

Mr. Dennery. Objected to.

The Court. Objection sustained.

Mr. Trumbull. If your honor please, if you will permit him to answer, he will say it does not. I want to get that in the record.

The Court. You have sufficient in the record.

Mr. Trumbull. The defendant excepts to the ruling of the court.

Q. You gave to the jury a while ago the definition or meaning of the word "train" in railroad parlance. Can you describe to the jury what a train is when made up?

Mr. Dennery. Objected to as calling for a conclusion and opinion of the witness.

Mr. Trumbull. Further than giving the definition of the word.

Mr. Dennery. Objected to.

The Court. I see nothing that can be added to the definition of a train.

Q. Will you tell the jury what the word "markers" in the defining of a railroad train means, if you know?

A. It is a special signal placed at the rear end of the train to indicate that the train is intact, that it is complete—colors signals by night and flags by day, colored flag by day.

Q. Those markers are at the front and rear end of the trains, too?

A. No, sir; a marker is only at the rear end.

Q. What do those markers indicate and mean?

67 A. They mean the train is full and complete; that is, the end of the train.

Q. When a train is full and complete, as you have said, is it then in condition to be moved out on the lines of the railroads—it may go on the roads, then; run to its destinations?

A. There are certain things required at the head end of the train.

Q. What is that?

A. A head light on the engine, and if it is an extra train—there are only two classes of trains; one is a regular train, which is a train that is on the time table and has a schedule; that is one class; and the only other class is an extra train, and an extra train and a regular train both carry markers, but an extra train carries two the

[illegible] signals on the front end of the train to designate it as an extra, which a regular train does not carry.

Q. The numbers are on an extra, as distinguished from a regular one?

A. No; not at all. The number of an extra and a regular passenger or freight is the same. A regular train carries nothing in front but a head light, unless run as a section, and an extra train is obliged to carry two white lights by night and two white flags by day to show it is an extra as distinguished from a regular; so as to complete a train, it must have those signals.

Q. Strings and flags that move around in the switch yards in charge of the switch crews, with switch engine, do not have any of those things on them?

A. At night——

Mr. Dawes (interrupting). The Government objects to that.

The Court. He may answer.

A. At night the switch engine would have a head light.

Q. And the numbers referred to?

A. The switch engine, under our rules, does not carry numbers. They are prohibited from carrying numbers. The switch engine is prohibited from carrying numbers.

Q. Under the rules of the American Railway Association?

A. Yes, sir.

Q. Those rules have been in force for at least twenty years?

A. Twenty-nine years.

Q. Has that definition of the word "train" always been in force by the American Railway Association for twenty-nine years or longer?

A. I don't think that definition of a train—the definition of a train we made while I was a member of the train rules committee of the American Railway Association.

Q. Twenty years ago?

A. During that time. I don't remember just when we made that, but it was eighteen or twenty years ago.

Q. Now, then, I will ask you whether or not trains, within the meaning of railroad parlance, perform different functions from those which drags—do they run out on the road and make long runs from point to point—switch drags do not do that?

A. No, sir.

Q. What are switch drags for; what function or duty as such do they do in the railroad business?

A. In the yards in the yards proper, where we have during rushes of large classification tracks, the switch engines sort the cars.

Q. Sort them?

A. Sort and put the cars of a kind together; that is switching; and when necessary, after the classification of cars has been made, to get to some other yard or to some other point, we call it a transfer.

Q. A transfer?

A. A transfer; that is the general name that is used—transfer or string.

Q. Transfer or string?

A. Yes.

Q. Then it is the work of this transfer or drag—switch drag, as you call it—it is either to assemble or take and get together cars coming in from different trains or get them together and take them where they can be put into their trains?

A. Supposing you have trains come into our yard across the river, and they may have cars for a dozen different destinations—might have four or five trains that might come in and have cars for elevators, if you have elevators, and the switch engine would separate them.

Q. Trains come in, and they stop in the yards at Murry?

A. Yes.

Q. And they are broke up?

A. They cease; the train ceases in the Murry yard.

Q. Ceases to be a train?

A. Ceases to be a train.

Q. Then the cars which compose the train are separated, broke up?

A. Sorted into what we call a drag, and what we call a drag is simply a movement of cars of the same kind, going to the same destination, hauled by a switch engine, as a rule, and if not a switch engine, a road engine that is acting for a switch engine.

Q. Then it is doing the work of the switch engine?

A. Yes, sir.

Q. And they are in charge of the switching crew, as distinguished from a train crew?

A. Yes, sir.

69 No cross-examination.

Witness excused.

JOE MCDONNELL, a witness of lawful age, produced, sworn, and examined on the part of the defendant, testified as follows:

Direct examination by Mr. TIMMONDS:

Q. What is your name?

A. Joe McDonnell.

Q. Where do you live?

A. Kansas City, Missouri.

Q. How long have you lived here?

A. Thirty years.

Q. What is your business?

A. I am assistant superintendent of the C., B. & Q. Railroad at Kansas City.

Q. How long have you been engaged in that business?

A. Four years.

Q. How long have you been engaged in the railroad business all together?

A. Thirty years.

Q. What connections have you had in the railroad business during that thirty years?

A. I commenced as a yard clerk; then went to switching; then went as assistant yard master; then I was a conductor; and then I went back in the yard as yard master, assistant yard master, and then general yard master; train master and superintendent, my present position. I am now assistant superintendent of the St. Joe division, Burlington.

Q. You have been here during the trial of this case, have you, and heard the other witnesses testify?

A. Yes, sir.

Q. There has been some reference made to a track, railroad track, which crosses the bridge here, over the Missouri River, which seems to run between a place called the Twelfth Street switch yards and the Murry yards—do you know the length of that single track which crosses the bridge?

A. Yes, sir; 3,000 feet.

Q. About a little less than three-fifths of a mile?

A. Yes, sir.

Q. Is there any other way whereby the two ends of these switch yards may be used except by getting across the river on that track?

A. There is not.

Q. Now, do you know where the switch-yard limits are?

A. Yes, sir.

Q. Tell the jury.

A. The north yard limit is at the switches, just north of the switches, and at the extreme north end of what is known as the Murry yard, the south limits of them is about Twenty-seventh and State Line Streets.

Q. On the south side of the river?

A. Yes, sir; south of Twelfth Street.

70 Q. Are these two ends now, and have they all along been, used together as constituting one switch yard in the management of the railroad business of the Chicago, Burlington & Quincy Railroad?

A. Yes; it is all one yard.

Q. How long has it been so?

A. It has been so ever since it has been a yard, ever since the yard was completed.

Q. How long has that been?

A. The Murry yard was added onto it, I think, about seven or eight years ago—about ten years ago, possibly, I don't remember the exact date.

Q. During all that ten years the two ends of it, and with the bridge between them, over the Missouri River, and between them, have been used as constituting one switch yard, in the management and handling of the railroad company's business here at Kansas City?

A. Yes, sir.

Q. And then this one track that crosses the bridge, that is the track referred to by the Government witnesses was it, the one you are referring to as being 3,000 feet long—that is the track they have been referring to?

A. I should judge so; yes, sir.

Q. And that 1,000-feet track which crosses the bridge is the only track, and is all within the switch limits?

A. Yes; all in the yard limits, sure.

Q. Did you hear the testimony of the Government inspectors as to the one end of the chain being loose from the lock block of one of the couplers on one of the Santa Fe cars?

A. Yes, sir.

Q. Are you able to state, from your experience as a railroad man, whether with that chain in the condition which they say it was, that car could be automatically coupled onto another car having an automatic coupler, by impact, even with the chain in the condition in which they said it was at that time?

A. Oh, yes; it would couple all right.

Q. By impact, automatically?

A. Yes, sir.

Q. State to the jury whether or not, with that end of the chain loose, as they say it was, those cars could be uncoupled without the necessity of a man or men going between the cars.

A. It could be.

Q. Tell the jury how.

A. All you would have to do would be to raise the lever on the other car—the other end—the other side.

Q. Is it true that on all cars of the kinds they have been talking about here, all cars have automatic couplers—there is an automatic coupler at each end of every car?

A. Yes, sir.

Q. So any two cars can couple automatically. Is it true that at each end of each car there is also a lever to be used in uncoupling?

A. Yes, sir.

71 Q. So, where two cars come together like that [indicating], having automatic couplers, they will couple automatically, by impact, even with this chain in the condition the Government inspectors say it was, and each of these cars has on each of its ends a lever to be used in uncoupling without going between the cars?

A. Yes, sir.

Q. And notwithstanding the condition of the chain—the condition in which the Government witness says it was—it could be uncoupled by the use of the other one of those levers without the necessity of a man or men going between the cars?

A. Yes, sir.

Q. Do you know, from your experience as a railroad man, whether the word "train" has any fixed, definite, and technical meaning, as applied to the railroad business?

A. Yes, sir.

Q. In railroad parlance, what is the meaning or definition of the word "train?"

Mr. SMITH. The Government makes the same objection to this question as made in regard to the testimony of the other witness.

The COURT. Objection overruled.

A. A train is one or more engines coupled together, with or without cars, with markers, markers displayed.

Q. A train, then, being as you define it, is a complete connection of cars, with a road engine and train crew for use in running on the railroad from destination to destination?

Mr. DOHERTY. Objected to as leading.

Q. Is it then in condition to be run on the road, in the railroad business?

Mr. DOHERTY. The complainant objects to the form and substance of the question.

The COURT. He may answer that question.

A. Yes; it is a train after the engine is on and way car put on, and the markers are displayed, and furnished with a train crew.

Q. And it is not a train until then?

A. No, sir.

Q. Now, you heard about these strings or drags of cars referred to, which are being hauled back and forth across the bridge here from one end of the yard to the other in the making up of trains and breaking up of trains—what, in railroad parlance, is the name of that string of cars?

A. A string of cars going from the Twelfth Street yard to the Murry yard would be called a drag, for the reason they would
72 go over there to be part of them sent out on trains and part of them to the elevators or the other industries or store tracks to be held; what we know as a drag of cars, a string of cars going from the yard in Kansas City, going to the Santa Fe, the Missouri Pacific, or the C. & A. would be known as a transfer, a delivery to the connecting line, a transfer to be delivered.

Q. Do they carry markers?

A. Oh, no.

Q. Do they ever carry markers in the railroad business, what you call markers on a train; drags do not carry markers?

A. No; only on trains, but not on transfers or drags.

Q. Are they ever entered upon the time tables, scheduled like trains are?

A. No, sir.

Q. Can you, in some general way, without taking up too much time, explain to the jury how drags, transfers, are handeled in the switch yards? Take a drag going from the south side of the river to the north side, and tell how the drag is made up and handled.

A. We receive from some ten or twelve different roads at Kansas City cars from different places, from the East, North, and Northwest, and those cars will be assembled and go into a drag, taken

over to Murry's—it might be elevator loads, or loads for the construction company, the McClintick-Marshall Construction Company, any of those people over there; they go over in one drag, over to Murry's, and are sorted over there in the classification yard.

Q. To be put into trains, if the trains go?

A. If they are train cars. Possibly there might be a few train cars and a few for other places. They are taken over there and classified and put in different places, but eventually delivered or sent out in trains, whichever the case might be, where the car goes.

Q. That is in charge of what is known as the switch crew with a switch engine?

A. Yes, sir.

Q. And the foreman?

A. That never gets out on what is called the main line; it is always within the yard limits.

Q. When they come the other way, from the north side of the river to the south side of the river, you say they are called transfers, properly?

A. Yes, sir.

Q. Explain to the jury the movements in that case, how made up, what for?

A. The trains that come from the North and West and from the East, if they pull in the Murry yard, they stop there, and the switching crews would take charge of them.

Q. Do they cease to be trains when they come in the Murry yard?

A. Yes, sir.

Q. And turned over to the switching crew?

A. Yes, sir.

Q. What does the switching crew do with them?

73 A. Classifies the stuff—switches it up to the different connecting lines it goes to.

Q. Break up the trains and take the cars out and classify them?

A. Yes, sir.

Q. What do they do with them?

A. They deliver them; all the cars that go to the Santa Fe to one track, and the cars of the Missouri Pacific to another, and the Union Pacific another, and so on, and then they are doubled up into transfers, and one engine, taking probably thirty or thirty-five cars, goes to Kansas City to deliver them to the different connections.

Q. Distributes them over here?

The COURT. Were these drags or transfers, whatever you call them, in controversy here of the kind and description you are now describing?

The WITNESS. Yes.

Mr. TIMMONDS. I so understood it, because he had given that definition.

Q. These drags or transfers in controversy, they did not display any markers?

A. Oh, no.

Mr. DOHERTY. He doesn't know.

Q. Do they ever display markers—any cars used in that manner?

A. We do not furnish the markers to the switch crews at all.

Q. And they never have any?

A. No, sir.

Q. And never display any?

A. No, sir.

Q. And they are never entered upon the schedules, the railroad schedules?

A. No; no schedule.

Q. They could not be handled in that manner?

A. I would not like to try to handle them in that manner.

Q. They never are?

A. No, sir.

Q. By any railroad?

A. No; not that I know of around here.

Cross-examination by Mr. DOHERTY:

Q. The Twelfth Street yard is one yard, is it not?

A. That is a part of our yard.

Q. The Twelfth Street yard is one yard within the limits of which classification movement is conducted, is it not?

A. There is very little classifying done there. It is possible we would separate one car from another every once in a while, but there is not much classifying done there.

74 Q. Now, is that down at the Twenty-ninth Street, farther out?

A. Quite a good deal of it done there.

Q. That is another yard?

A. That is the south end of our yard—of the Burlington yard.

Q. But it is called the Twenty-ninth Street yard, is it not?

A. Twenty-fifth Street.

Q. Twenty-fifth?

A. Yes, sir.

Q. Any other name for it?

A. I believe that district out there has got the name of Toad-a-loupe. I don't know where they got it.

Q. Is it called at all the Twenty-fifth Street yard?

A. Yes.

Q. And is there a yard which is called the Twelfth Street yard?

A. Yes, sir; a part of our yard.

Q. There is a yard called the Murry yard?

A. Yes.

Q. Now, how many miles between those yards?

A. You mean from Twelfth Street to the Murry yard?

Q. Yes.

A. Probably two miles.

Q. And to go from one to the other, from the Twelfth Street yard to the Murry yard, you have to go upon the main line of track of this railroad, don't you?

A. I never judged it was main line.
Q. It is a line used by the trunk-line trains, isn't it?
A. I don't know what you mean by "trunk-line trains."
Q. It is used by express and passenger trains, is it not?
A. Yes; by passenger trains.
Q. Of what railroads?
A. C., B. & Q., Wabash, and Rock Island.
Q. And that covers the distance of two miles between those yards?
A. Oh, my, no.
Q. How much of that distance is used by passenger trains?
A. Probably 4,000 feet of it.
Q. 4,000 feet used by passenger trains?
A. Yes.
Q. And how much of that line of track between these yards is used by through freight trains?
A. All the track from the Twelfth Street yard over to the entrance of the Murry yard is used by some through freight trains.
Q. So that for two miles these trains were operated over the line of interstate highway used for the passage of interstate trains; that is true, is it?
A. Yes, sir.
Q. Now, these trains that were made up in one yard to go to another—whether you call them trains or drags or transfers—they are not run on regular time-tables?
A. No, sir.
75 Q. They have no proper schedule time?
A. No, sir.
Q. They are made up, as the case may be, and take their chance on getting by, do they?
A. Yes, sir.
Q. They have to keep out of the way of express and through trains, don't they?
A. They run right along ahead of them, or behind them.
Q. They are operated under some kind of orders, are they not?
A. Operated under a block system.
Q. And they proceed when it is supposed that an express train is not coming?
A. They proceed whenever they get the block.
Q. And those blocks are governed by signals that come from the dispatcher's office?
A. No; there is no train dispatcher there.
Q. By orders that come from where?
A. From the towermen that work the switches.
Q. Where do the towermen get orders as to when trains are coming?
A. From one another. They let one train follow another, right along.
Q. And the express trains lose their time schedule, do they, when they arrive within the limits there, and have to wait upon the con-

venience of any of these other trains that happen to be let into the block by the towermen?

A. Yes, sir; you bet that is true; they have to wait.

Q. Now, I understood you to say, in answer to the questions put to you by the counsel for the railroad, that the classification of these trains was made up in the yards at either end, that is at the Murry yard or at the Twelfth Street yard. The strictly classification movement is made in those particular yards, is it not?

A. I don't remember answering any question of that kind.

Q. Didn't you say that these transfers were made up, and then taken to the Murry yard, and there classification movement begun, and they were taken and distributed, put into trains they were going out in?

A. That is right.

Q. The reverse of that is true with trains going the other direction—transfer trains are made up there and pass over this main line, going to the other yard, and they are there distributed?

A. They are delivered.

Q. They are delivered at the Twelfth Street yard?

A. No; at the other yard.

Q. At the other yard beyond the Union Station?

A. Yes; or any of the railroad yards in Kansas City.

Q. Or any of the railroad yards in Kansas City?

A. Yes, sir.

76 Q. And the switching, strictly so called, is done within these particular yard limits?

A. Assembled together.

Q. Taken apart and put together within the limits of those particular yards?

A. Yes, sir.

Q. That is not done on the main track?

A. It could not be done on a single track.

Q. No; this single-track switching is not done on the main track?

A. You can't do switching on one single track.

Q. You can not do switching on one single track?

A. No.

Q. The switching, therefore, is done in these particular yards, at either end?

A. I understand what you are driving at——

Q. (Interrupting.) Answer the question yes or no.

A. Yes; but the switching crews do use the main line to do switching; get on it to do the switching.

Q. Do they pass over the whole two miles to do switching?

A. Hardly ever handle or switch that many cars; no.

Q. It may approach, to a slight extent, upon the main line in their switching work?

A. Yes, sir.

Q. But it is not calculated that the main line shall be used for switching work, is it?

A. It has to be used for some of it.

Q. To a slight extent?

A. I don't know to what extent; I can not say as to that. I have not done any switching for quite awhile.

Q. After the switching is done and a drag of cars is made up at one of these yards, it then is run as a unit over the main line to the other yard, where it is then separated; that is the truth, isn't it?

A. It is run as a unit through the yard to the delivering point.

Q. Over these two miles of track?

A. Yes, sir.

Q. Single track?

A. Yard track; yes, sir.

Q. If that two miles of track is not main track, then there is not any main track, is there?

A. Oh, yes; lots of it.

Q. Between Murry yard and the Twelfth Street yard?

A. No; there is no main track.

Q. There is no main track?

A. No.

Q. And you say that the tracks used by all those railroads for passengers trains and freight trains are not main line?

A. No, sir; yard track; governed under yard rules; moved about over there under yard rules.

Q. There would be nothing to prevent extending the limit out for twenty miles, would there, and operate under yard rules just the same?

77 A. I don't know as to that. That would be a question for the management to decide.

Q. There would be no main lines for twenty miles if you merely extended your own yard limits?

A. If they extended the yard limits twenty miles it would all be yards.

Q. Do these tracks between Twelfth Street and Murry yard cross the tracks of any other line of railroad?

A. They cross the Union Depot tracks.

Q. I mean do they cross practically at right angles the tracks of any other railroad?

A. No, sir; not until they get to the west end of the Union Depot; from the west end of the Union Depot we cross a dozen or fifteen tracks, probably.

Q. A dozen or fifteen tracks?

A. Yes; go clear across them.

Q. Of the Terminal Company?

A. Yes.

Q. Do you cross the tracks of any other railroad, except these fifteen or more tracks of the Terminal Company?

A. No; there is not that many Terminal tracks there, and there we cross one of the Frisco tracks.

Q. You do cross the Frisco?
A. Yes, sir.
Q. How many tracks of that?
A. One.
Q. That is the only line you cross?
A. This switch line of the packing houses.
Q. Between the Twelfth Street yard and Murry yard how many tracks do you have paralleling the tracks of the Terminal?
A. One. We have one that parallels and have a whole lot of tracks east of that.
Q. How many?
A. Oh, some eighteen to twenty tracks.
Q. Do you call that your Terminal yard?
A. That is the passenger-train yard.
Q. Eighteen to twenty tracks there?
A. Yes, sir.
Q. Then, where is the first freight yard after you leave the Twelfth Street yard?
A. The first freight yard?
Q. Yes.
A. Where freight trains are made up or broken up?
Q. Yes.
A. Murry.
Q. How many tracks there?
A. Oh, quite a good many; seventeen or eighteen in the classification yard, and six in the reception yard, and six or seven in the departure yard, and eight or nine in the grain yard, and four or five in the repair yard.
Q. How long is the Murry yard?
A. It is about a mile and half, I should judge, or two miles.
Q. About how wide?
78 A. It is probably a quarter of a mile wide.
Q. How long is the Twelfth Street yard?
A. That is very long.
Q. How long is it?
A. It runs from Twelfth Street to Twenty-ninth Street—Twenty-eighth Street, out there.
Q. What would be the distance or length?
A. It is probably fourteen or fifteen blocks.
Q. What distance, what part of a mile?
A. About a mile and a quarter.
Q. The Twelfth Street yard?
A. Yes, sir.
Q. About how wide is it?
A. It is wide; it has a pretty good width some places, and other places only——
Q. (Interrupting.) Give us some idea of the distance, of the width, extent.
A. About two hundred yards wide, I should judge.

Q. How many tracks are there?
A. Sixteen or seventeen.
Q. Any loading and unloading done there?
A. Sure, on the team tracks.
Q. How many team tracks?
A. There is eight; I think it is—eight or nine team tracks.
Q. How many departure tracks?
A. How many departure tracks?
Q. Yes, sir; for trains to go out from the yard.
A. These tracks there, that is open at both ends—I don't know whether you call them departure tracks or not.
Q. Any other tracks there than these you have described?
A. Yes, sir; what we call "hold" tracks.
Q. And that is the yard where classification movements are made?
A. No; they assemble stuff there for the Murry yard; they do classifying of eastbound trains there.
Q. There is classification done there?
A. Yes, sir.
Q. And classification done at the Murry yard?
A. Yes, sir.

Cross-examination continued by Mr. SMITH:

Q. Now, as I understand, the Murry yard—the Murry yards are the most northerly yards to which you have referred?
A. That is the north end part of the yard; yes, sir.
Q. And the Murry yards come down to—nearly to the northerly approach to the Burlington Bridge across the Missouri River?
A. Yes.
Q. Then comes the approach to the bridge, the bridge across the Missouri River?
A. Yes, sir.
79 Q. Then you get over on the south side of the Missouri River and onto your own tracks there, and down through the Terminal Company's tracks, in front of the Union Station, down to Twelfth Street?
A. Yes, sir.
Q. And what is known as the Twelfth Street yards begin at Twelfth Street and extend south to Twenty-ninth Street, or in that neighborhood?
A. Yes, sir.
Q. And the distance from the south end of the Burlington Bridge to the north end of the Twelfth Street yard is some twelve or thirteen blocks, I suppose, or fifteen possibly?
A. I don't know just how far it is; no blocks in there.
Q. The street begins to number at the river; you know that?
A. Yes, sir.
Q. And it would be about twelve blocks south of the river to where the Twelfth Street yards begin?
A. Yes, sir; just about, I guess.
(Witness excused.)

F. H. USTICK, a witness of lawful age, produced, sworn, and examined on the part of the defendant, testified as follows:

Direct examination by Mr. TIMMONDS:

Q. What is your name?

A. F. H. Ustick.

Q. Where do you live?

A. St. Louis.

Q. What is your business?

A. General superintendent of the Burlington's Missouri lines.

Q. How long have you held that position?

A. Four years.

Q. How long have you been in the railroad business, in any respect?

A. About thirty-three years.

Q. Tell the jury the different positions you have held in the railroad business, in the management of the railroad business, or in the operation of railroad business during that thirty-three years, beginning at the first—I don't care to have you give the length of time in each, but name them as you go along.

A. Car repairer, switchman, brakeman, freight conductor, passenger conductor, general yard master, superintendent of terminals, division superintendent, up to my present position as general superintendent.

Q. I wish you would state to the jury whether or not the word "train" has, and has had for the last twenty years or more, in the railroad business, and amongst railroad men handling railroad business, any fixed definite, and technical meaning as applied to that business.

A. Yes, sir.

Q. Tell the jury what that meaning is.

80 A. One or more engines coupled together, with or without cars, displaying markers, constitutes a train.

Q. And that is the meaning, in railroad parlance, of the word "train," and has been all these twenty years or more?

A. Yes, sir.

Q. What is a drag, or transfer, in railroad parlance, if there is any such word?

A. A drag is considered a yard movement of cars, being shifted from one yard to the other, through the leads, and a transfer is a delivery that—a string of cars rather that is being delivered to connecting lines.

Q. Those movements of cars are all in switching of the cars?

Mr. DOUGHERTY. I object to the form of the question.

The COURT. Objection overruled.

A. Yes, sir.

Q. You have been present to-day and heard the description of these strings of cars that cross the bridge here across the Missouri River between the north and south ends of the switch yards of the Burlington Railroad Company?

A. Yes, sir.

Q. In what respect, if any, do they differ from a train in railroad parlance?

A. They are all different, because yard movements of cars are handled by men who shove the cars, and who are known as yardmen or switchmen, who do not have to pass an examination for train service, while the train on the road, the conductors and engineers are required to pass an examination on all rules and time tables before they are permitted to take charge of train work.

Q. Your explanation has reference to men, my inquiry had reference to a string of cars.

A. Well, a train is a——

Q. (Interrupting.) You gave the definition of a train; in what respect do these strings of cars we have been talking about here to-day differ from a train in railroad parlance?

Mr. Donovan. Objected to as leading.

The Court. Objection overruled.

A. In what respect do they differ?

Q. Yes; either in function or make-up.

A. The yard train is a train that is being broke up, switched, or delivered to connections, while a train is a movement of them from one terminal to another.

Q. Do these dogs or transfers ever display markers in the railroad business?

A. No, sir.

Q. Do they have places on the schedules of the railroads?

91 A. No, sir.

Q. Trains are always scheduled, are they?

A. Yes, sir.

Mr. Donovan. No questions.

(Witness excused.)

Jos McDevenna, recalled for further examination on behalf of the defendant, testified as follows:

Direct examination by Mr. Trevenen:

Q. When you were being cross-examined you stated, in answer to a question propounded to you by the attorney, that these dogs and transfers did not get their signals from the train dispatcher. What is a train dispatcher?

A. He is the man that handles the trains over the main line, from one terminal to another; dispatches trains; gives them running orders.

The Court. What do you mean by "from one terminal to another"?

The Witness. Like from here to St. Joe or Omaha, one division is from here to St. Joe.

Q. They give running orders to the different trains on roads, as they are run?

A. If it is not a scheduled train; if regularly scheduled, they go out on schedule; if an extra train, he would give it a written order, give it a right to proceed over the main line.

Q. They get that from the train dispatcher?

A. Yes, sir.

Q. He keeps in touch with the movements of the trains as they run on the main lines?

A. Yes, sir.

Q. If a train loses its schedule time, it gets orders from the train dispatcher after it loses its schedule time?

A. After twelve hours, if twelve hours.

Q. It directs where to meet other trains and where to pass them, things of that kind?

A. Yes, sir.

Q. You stated that the switching crews here, in operating from [illegible], did not get any instructions or instructions or signals from the dispatcher, but said something about them getting signals somewhere else, without explaining. Tell that to the jury.

A. If a transfer is going out of the [illegible] Street yard for [illegible] they call up the tower man, what is known as the [illegible]
[illegible] tower, and he will, if he can handle the transfer at [illegible], he will call the man at the C. & A. tower, and if he says, "Let them come," they let the transfer come.

Q. What is a tower man and what is a tower?

A. A tower is a place built to handle the interlocking levers of the switches, where the switches are thrown up in the tower.

Q. These men in the towers who give these signals for the movements, and they call to know whether their [illegible] may be used or not?

A. Yes, sir.

Q. And they get their instructions from them?

A. Yes, sir; the C. & A. tower, south entrance to the bridge. He will let a transfer, two, three, or four of them follow right up on the one double track, as far as the C. & A. tower, if there is a train coming from the opposite direction, over this piece of single track.

Q. Over the bridge?

A. Yes; he holds them there until they get in, and then lets them go; maybe three, four, or five follow over.

Q. There is a tower at this end and the other side?

A. Yes, sir; the same way going out of [illegible]; they report where they want to go, and the tower man report to one another and move the trains the best they can.

Q. Without schedule?

A. Yes, sir.

Q. You referred awhile ago to a block system in your examination; what do you mean by block system?

A. [illegible] signal governs the movement; whenever they get that signal, if against them, what we call against them, they [illegible] there until they get the signal and the tower man throw that signal.

Q. The signal is a certain arm?

A. Yes, sir; on a semaphore pole it moves up and down.

Q. A thing that keeps a certain position, place, and color, something of that kind, and it is known by the railroad men what it means?

A. Yes, sir.

Q. And the men in the tower and the men in operating the cars know by looking at that whether the way is open?

A. Yes, sir; if straight out, they have to stop; if red, at night, they stop; if white at night, they proceed; if lowered or raised—they have two or three different kinds of signals.

Q. They know what it means?

A. Yes, sir.

Q. When displayed in any different position or way with color?

A. Yes, sir.

Q. That is how these movements of cars are controlled?

A. Yes, sir.

(Witness excused.)

F. C. RICE, recalled for further examination on behalf of the defendant, by Mr. Timmonds, testified as follows:

83 Direct examination by Mr. TIMMONDS:

Q. I hand you here book—printed book—said to be book of rules of the operating department of the Burlington route, and I call your attention to the definition of the word "train" appearing therein, at the top of page 6. That is the same definition you gave awhile ago, the printed definition?

A. Yes, sir.

The COURT. Of what?

Mr. TIMMONDS. A train.

Q. I will ask you if that definition appearing there is the same definition—first, I will ask you if, by reason of your connection with the American Railway Association, you know whether these four hundred and odd railroad companies have printed rules of that same character—printed rules, giving the definitions—whether they use these books, adopting that printed matter?

A. I don't think there is a railroad in the United States that has not that definition.

A. Yes, sir.

Q. All those four hundred odd railroads, composing the American Railway Association, have them?

A. Yes, sir.

Q. They are handed out throughout the country, to their railroad operatives, of all their roads, with that definition in them?

A. Yes, sir.

Q. And it is promulgated—the rules are promulgated, aren't they, by this same American Railway Association?

A. It is adopted by the members of the association.

Mr. TIMMONDS. I desire to introduce in evidence this definition.

The COURT. Very well.

The said rule in said rule book, last above referred to, is in words and figures as follows, to wit:

"(Page 6) Train.—An engine or more than one engine coupled, with or without cars, displaying markers."

Mr. TIMMONDS. Defendant rests.

(Demurrer to evidence and exceptions to ruling thereon.)

Mr. TIMMONDS. At the close of all the evidence the defendant demurs to the evidence as applied to the first count in the complaint, which demurrer is by the court overruled, and defendant then and there excepts to such ruling.

84 At the close of all the evidence the defendant demurs to the evidence as applied to the second, third and fourth counts in the complaint, which demurrer is by the court overruled, and defendant then and there excepts to such ruling.

The COURT. The record will show that the Government files a reply in the nature of a general denial to the answer.

Gentlemen of the jury, we have finished the taking of evidence in this case. There are some matters of law that counsel desire to take up with the court, and for that reason you will now be excused until to-morrow morning at ten o'clock, returning at that time, and by that time these matters will be finished.

Thereupon court was adjourned until the hour of ten o'clock a. m. of Friday, May 2, 1912.

Pursuant to adjournment of yesterday, court convened at the time and place therein stated, whereupon the following proceedings were had, to wit:

The COURT. You may proceed with the argument.

(During the progress of the argument on behalf of the complainant, by Mr. Doherty, the following exceptions to the following remarks were taken by counsel for the defendant:)

Mr. DOHERTY. "Let us take, for a moment, this car, in this very condition, and it goes into some railroad yard at night, and a man, in the hurry and the rush with which their duties are performed, goes up to that car, to this lever, and undertakes to uncouple it—it does not work. Now, what does he do? As a matter of general practice—would he remain long in the employ of that company if he went to uncouple the car from that train, which it was his immediate duty to do, and he should start on a journey around the end of that train of forty-six cars, if he started to travel over the top of that car"——

Mr. TIMMONDS (interrupting). Defendant excepts to the remarks of counsel about what an employee would do under the circumstances, for the reason it is prejudicial and unfair to the company.

The COURT. The jury will understand that has no bearing upon the case whatever and is a mere matter of discussing a phase of the law, and perhaps counsel will proceed no further with it. I think it is no farther outside than some of the other arguments.

85 Mr. TIMMONDS. Defendant excepts to the ruling and also to the remark of the court.

The COURT. Very well.

Mr. DOHERTY. "You can see that if it was not so, there would be a temptation to the men to go in there and get between the cars and do that, and it was to remove that temptation from the men that this statute was passed for their protection."

Mr. TIMMONDS. Defendant objects to the remark and excepts to it, as to "removing the temptation."

The COURT. Proceed with the argument.

Mr. TIMMONDS. Defendant excepts to the ruling of the court.

Instructions to jury requested by defendant and exceptions to rulings thereon.

Thereupon, after argument to the jury, the defendant requested the court to give the following instructions to the jury:

No. 1.

The court instructs and charges the jury:

That, under the pleadings and the evidence in this case, you should return a verdict in favor of the defendant company on the first count of the complaint.

(Refused.)

No. 2.

The court instructs and charges the jury:

That, under the pleadings and the evidence in this case, you should return a verdict in favor of the defendant company on the second count of the complaint.

(Refused.)

No. 3.

The court instructs and charges the jury:

That, under the pleadings and the evidence in this case, you should return a verdict in favor of the defendant company on the third count of the complaint.

(Refused.)

No. 4.

The court instructs and charges the jury:

86 That, under the pleadings and the evidence in this case, you should return a verdict in favor of the defendant company on the fourth count of the complaint.

(Refused.)

No. 5.

The court instructs and charges the jury relative to the first count in the complaint:

That, although you may believe from the evidence that the uncoupling chain referred to in said count was disconnected from the lock block, as alleged in said complaint, yet, if, notwithstanding that fact, you shall further believe from the evidence that the car, with the chain in that condition, might and could be coupled with other cars automatically by impact and might and could be uncoupled from other cars without the necessity of a man or men going between the ends of the cars, then it is your duty to return a verdict in favor of the defendant railroad company on said first count.

(Refused.)

No. 6.

The court instructs and charges the jury:

That, if you shall believe from the evidence that the uncoupling chain referred to in the first count or cause of action was properly connected to and with the lock block therein referred to when received by defendant, and that it became disconnected from said lock block while being moved by defendant on its tracks, and that such disconnection was first discovered by defendant or its employes after the car had arrived at and was in defendant's switch yards known as "Murray yards," referred to in the testimony, and that it was then and there by defendant immediately again properly connected before said car was further hauled or moved, then it is your duty to return a verdict in favor of the defendant on said first count or cause of action.

(Refused as asked.)

No. 7.

The court instructs and charges the jury:

That, if you shall believe that the cars referred to in the second, third, and fourth counts of the complaint, and also referred to by the witnesses as "drags," "cuts," or "transfers," were moved or hauled by the defendant upon its own tracks and wholly within its own switch yards, and that the only movements thereof were switching
87 movements necessary to be made in the breaking up of trains coming into such switch yards, and the making up of trains to depart therefrom, then you should return a verdict in favor of the defendant on said second, third, and fourth counts.

(Refused.)

No. 8.

The court instructs and charges the jury relative to the second, third, and fourth counts or causes of action set forth in the complaint:

That if you shall believe from the evidence that none of the strings of cars referred to in the complaint, and referred to in the testimony as "drags," "cuts," or "transfers," were "trains," then it is your duty to return a verdict as to each and every of said second, third, and fourth counts in favor of the defendant. And in this connection the court further instructs and charges you that if you shall believe from the evidence that in the railroad business the word "train" has, among railroad men and in railroad parlance in the United States, a fixed, definite, and technical meaning, and so had such meaning on and before March 2, 1893, then it will be and is your duty to apply and give to that word, as used herein and in other parts of these charges and instructions, such meaning; and if, by using and applying such meaning, you shall find and believe that none of the strings of cars above referred to constituted a "train" in such railroad parlance, then it is your duty to return a verdict in favor of the defendant company as to each and every of said second, third, and fourth counts.

(Refused.)

Which instructions the court refused to give, to which ruling of the court in refusing to give all and each of said instructions, the defendant then and there excepted and still excepts.

Court's instructions to jury and defendant's exceptions thereto.

Thereupon the court instructed the jury as follows:

Gentlemen of the jury, this case has now been narrowed down to a somewhat restricted compass. It now becomes the duty of the court to instruct you as to the law governing the matters submitted to you for your determination. As has been stated to you, this complaint or petition on behalf of the Government contains four counts or causes of action, and as has also been said to you by counsel, the court has determined that the law is such, under
88 the facts that have been presented here, that the verdict must be for the plaintiff—that is, the United States—upon the last three counts of the complaint—that is, the second, third, and fourth; so that it is unnecessary for you to consider that question, which is the coupling up of the air on the trains, at all.

The court has had prepared a form of verdict as to those last three counts. It will be your duty merely to sign those forms relating to those three counts as prepared by your foreman.

The question before you now is as to whether there has been any violation of this law, entitling plaintiff, the United States, to recover upon the first count of the complaint, or whether your verdict should be for the defendant. This first count concerns the question of whether this car, marked "A., T. & S. F. No. 19,060"—as the court remembers it—was moved in this movement, in this train, in such a manner as to constitute a violation of the law because of a defect in its coupling appliances. Counsel has told you truly that it does not matter, for the purposes of this consideration, what sort

of a device was used, or whether it included a chain or not, but the evidence is that the particular device used did include a chain, and the consideration then is whether the defect in that chain, if any existed, was of such a nature as to cause its condition to be in violation of the law prescribing what coupling devices should be. The section applying to that is this: "On or after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can not be uncoupled without the necessity of a man's going between the ends of the cars." Now, then, the question before you is the construction of that act, as the court will construe it, as applied to the facts in this case, and what the facts are with respect to the condition of that coupling apparatus, as to whether it would permit to be done what the law prescribes that the devices of the cars so used must permit to be done. It will be seen that this law requires that each car so used upon a common carrier, a railroad line, of the nature contemplated by the statute, and this is such a line, and in a movement contemplate by the statute, and the court instructs you this is such a movement, should be so equipped and in such a condition that it will permit the coupling by impact and uncoupling without the necessity of going between the cars of the train. Counsel has adverted to the fact, and it appears in evidence, that the cars would from their automatic
89 devices, couple by impact—so that part of the matter is beyond your consideration. That is determined—that it was not defective in that particular respect. The question then comes as to whether it would uncouple without the necessity of going between the cars. Counsel here adverts to the fact, and it is undisputed in evidence, that where two cars come together there is a lever attached to each car, and on opposite sides of the train, by either of which that uncoupling can be effected. The court instructs the jury that the meaning of this law is that the device contemplated by this act is such a device as is perfect, within the operating meaning of this statute, with respect to each individual car considered as a unit, and that it is not enough that there may have been, at some other part of the train, some device which, if known or thought of, or considered, might be used for the same purpose; the question is whether this car in its equipment was so complete and perfect that that could be done with respect to it that is required by this statute. Consequently, as I say, if you find that the device upon this particular car, in this case, and it appears from the evidence that this chain had some connection with it, was in such a condition that the device upon that car, the lever, as it is said to be, I believe, could not be used for the purpose of uncoupling that car without the necessity of going between the cars to effect it, or getting over and using some other device on another car, then that car was not in the condition it was required to be in by the law. So that it makes no difference whether a railroad man need not have gone in there, by using a de-

vice upon some other part of the train, or whether he would have taken upon himself to act negligently and go in there, or whether the railroad company would discharge him if he did not act negligently in uncoupling these cars. Those considerations have nothing to do with this case, and you should not allow yourselves to be prejudiced by the remarks of counsel on either side as to the necessity of this law, or what its effect would be in this particular case. The court wishes to remove from your minds any such prejudice. This law was passed for the purpose of protecting employees of the railroad from undue danger and from getting in a position where they would be hurt in what was deemed to be a condition of necessity, but as to what the acts of the railroad company, or what the acts of the employee might have been in a certain instance, makes no difference. The court instructs you that this car must itself have been so equipped that it could be uncoupled by the use of the device attached to it, without the necessity of going between the cars, or there was a defect within the meaning of this law.

90 The only question for you to determine, then, is whether this coupling device on this car was actually out of order, and whether it was out of order at the time this movement from the Twelfth Street yard started over into what is called the Murray yard, or whether it took place on the way over there, after that movement started. If it was not out of order when that movement started from the Twelfth Street yard to the Murray yard—if this clevis dropped off on the way over there, when that train was actually proceeding upon that movement, and it was then discovered and fixed as soon as it reached the Murray yard, and at least before any other movement of that train or any of those cars took place, then there would be no offense here. Then your finding should be for the defendant. If, on the other hand, it was out of order at the time that train moved, at the time this train was made up and moved from this Twelfth Street yard over across the Hannibal Bridge into the Murray yard, then it was incumbent upon the defendant to have known of and had that defect remedied, because the law imposes upon the railroad company the absolute duty, as guarantor, that its devices shall be in perfect condition on all its cars in this respect when such a train movement, within the meaning of this law, such as this was, takes place. If, of course, the chain was all right, had been inspected and was all right before that train moved, and if, as I say, then the clevis dropped off the chain, got out of order on the way over there, was then discovered or brought to the attention of the railroad company, and they fixed it immediately, and before using the car in any further movement, then the railroad company has committed no offense, because the law provides that while this is going on, in such a movement, when it happens in transit, and is fixed at the first time, at the first repair place, the railroad company has done all that can be expected. You will decide from the testimony brought before you what you believe the facts about that to be.

You have before you two inspectors of the railroad company, Mr. Gorman and Mr. Burke, who both say—at least one of them—that on the evening before, I think the testimony is, that on the evening before, but, at any rate, before the train moved or before the car was moved in this particular movement, they inspected the car and found it had nothing out of order, and that they made a notation of everything they found out of order, and that the notation did not contain any reference to the chain, so they say and testify, when they inspected it, that the chain was properly in place, and, secondly, that the device was in perfect working order. Of course,
91 you are to find also, from the testimony, and the court believes that is undisputed, that the chain in place, with the use of that clevis, was essential to the working apparatus upon that particular car for the purpose of uncoupling the car without the necessity of going between the cars. That, also, is a matter for your determination. Mr. Starbird and Mr. Gibbs, the inspectors on behalf of the Government, both testified that shortly before the train moved, practically almost before it moved, they inspected this train, looking among the cars, and found that this chain was then out of order; that this clevis was not there, and the attachment was not such that the lever would work. They say they rode over with the train, and when they got over there it was still in the same condition. Mr. Starbird says he called the attention of the local inspector in the Murray yard to this matter, and that he immediately got a clevis and put it on and fixed it. It is unimportant whether it was fixed easily or could be fixed easily. The question, What was its importance in the running of this device? It is necessary, and the courts in construing the law have so found, as I have said, that the duty devolves absolutely upon the railroad company to see that these devices upon its trains, when they go upon the movements, shall be in first-class condition, and that if they are not, and it goes upon a movement, it is unnecessary to inquire whether they have used what would ordinarily be called diligence, whether they have made inspection, or what they have done, because it is well known that if that always had to be proved that there had been absence of diligence it would greatly complicate the enforcement of this law, and the courts have held that the law, in order to be enforced in accordance with the true tenor, spirit, and purpose must be held to fix an absolute duty upon the railroad company, and that if that is absent under certain circumstances and in a certain instance it would constitute a violation if the defect existed: that then they must be responsible.

Now, as to the duty of these inspectors—the court feels bound to say to you, in light of the argument that has been made to you, that there was no duty upon the part of these inspectors to inform the railroad company of what they discovered as the train was standing in the Twelfth Street yard. It is a fact that this law could not be enforced, could not be held up to a high standard of effectiveness if there was not inspection authorized and put into force by

the Government, by the Interstate Commerce Commission, which has that duty in charge, to see that the law was being enforced, and discover whether railroads were negligent in observing it. For that reason it is necessary to send out inspectors—not in the capacity of inspectors, nor as assistants to the inspecting department of
92 the railroad, not for the mere purpose of guarding against accident, because the Government could not become responsible for that, but merely to ascertain in this particular case, and in this kind of a case, whether the railroads are observing the law—whether violations are occurring, because when violations are discovered, and proceedings instituted under them, that has the effect—tends to have the effect—and is intended to have the effect of holding the railroad companies up to a higher and better observance of their duties under this law. So that, not only had the inspectors no duty to perform in the way of informing the railroad company, but if they had done so, they would not only have violated their orders, but would have defeated the very purpose for which they are sent out there—that is, to discover whether the railroad company was obeying the law. So, you should dismiss from your minds any idea, as bearing upon this case, that there was any duty upon the inspectors so to notify the railroad company, or that they did anything wrong in any sense by failing to do so. The question was not here as to whether somebody was going to be hurt on this trip, but whether there was any defect, in effect the general rule of observance upon the part of the railroad of the requirement of the law, and in order to discover it, they had to go there and see what they found and report upon it. Of course, as I have said, if you find this company's appliance was not out of order at any time, your finding must, necessarily, be for the defendant on the first count. If you find or believe that it was in good order when the train started on this movement, and merely got out of order on the way over there, and that it was then discovered and immediately fixed, without further movement again, your finding must be for defendant. If you find, however, this chain was out of order before that movement started, and that the nature of that defect was such that this car, by the use of its own devices, could not be uncoupled without necessity of going between the cars of the train, or the use of some other apparatus upon some other part of the train, then your finding should be for the Government.

Gentlemen of the jury, you have seen all these witnesses upon the stand; you have heard all this testimony, and you are the sole judges of the facts in this case, of the weight of the evidence, and credibility of the witnesses. You are not to be governed in that respect by anything that may be said to you by court or counsel. The burden is upon the Government to establish its case, in this respect, by the preponderance of the credible evidence, in your estimation. By preponderance of the evidence means, as I said, the preponderance of the credible testimony, such as appeals to you as

the more credible, in the light of all the facts and circumstances in the case.

93 As I have said, a form of verdict has been prepared here upon all four counts. As to the last three counts, the finding is to be for the plaintiff, and you are simply to sign them, by your foreman. As to the first count, the verdict reads as follows: "We, the jury, find for the on the issues in the first count of the petition herein." In the form you will insert the word "plaintiff" or "defendant," accordingly as you may find, and sign the same, by your foreman, as you do the other counts.

I will add also—it is in furtherance of what I have already remarked to the jury—that if you believe from the evidence the uncoupling chain referred to in the first count of the cause of action was properly connected to that lock block therein referred to, when received by defendant, and became disconnected from said lock block while being moved by defendant on its tracks from the Twelfth Street yard to the so-called Murray yard, and that such disconnection was first discovered by defendant or its employees after the car had arrived at or was in its switch yard, known as the Murray yard, referred to in the testimony, and that it was then and there by defendant immediately again properly connected before said car was further hauled or moved, then it is your duty to return a verdict in favor of defendant on the first count or cause of action. You will recall, gentlemen of the jury, that that is in line with what the court has already instructed you in this matter.

The COURT. Any exceptions to the charge?

Mr. TIMMONDS. Yes, your honor, quite a number.

Thereupon the defendant objected and excepted to the charge of the court, as follows:

Mr. TIMMONDS. Before the jury retires defendant desires to note its objections and exceptions to the actions and rulings of the court in refusing to give the instructions which the defendant has asked to be given, and which for convenience have been marked "Numbers 1, 2, 3, and 4," inclusive, being peremptory instructions to find for the defendant on each of the respective four counts in the complaint.

The defendant also objects and excepts to the rulings and actions of the court in refusing to give its other written requested instructions, which for convenience' sake have been marked and numbered, respectively, "No. 5," "No. 6," "No. 7," and "No. 8," and in this connection desires to inquire of the court whether referring to these respective requests by their numbers is sufficient for the purpose of informing the court and advising the court of the point?

94 The COURT. Certainly. General reference would have been sufficient.

Mr. TIMMONDS. I am inclined to think so.

Mr. TIMMONDS. As to the charge given by the court, defendant makes the following objections and exceptions thereto:

First. Defendant objects and excepts to that part of said charge directing the jury to return a verdict in favor of plaintiff on the second, 3rd, and fourth counts of the complaint.

Second. Defendant objects and excepts to that part of the charge instructing the jury as to the meaning of section 2 of the safety-appliance act, which part of said charge was in the following words:

"As has been stated to you, this complaint or petition on behalf of the Government contains four counts or causes of action; and, as has also been said to you by counsel, the court has determined that the law is such, under the facts that have been presented here, that the verdict must be for the plaintiff—that is, the United States—upon the last three counts of the complaint—that is, the second, third, and fourth—so that it is unnecessary for you to consider that question, which is the coupling up of the air on the trains, at all.

"The court has had prepared a form of verdict as to those last three counts. It will be your duty merely to sign those forms relating to those three counts as prepared, by your foreman."

Third. The defendant objects and excepts to that part of the charge being in the following words:

"The question before you now is as to whether there has been any violation of this law, entitling plaintiff, the United States, to recover upon the first count of the complaint, or whether your verdict should be for the defendant. This first count concerns the question of whether this car, marked 'A., T. & S. F. No. 19,060'—as the court remembers it—was moved in this movement, in this train, in such manner as to constitute a violation of the law because of a defect in its coupling appliances. Counsel has told you truly that it does not matter, for the purposes of this consideration, what sort of a device was used or whether it included a chain or not, but the evidence is that the particular device used did include a chain, and the consideration, then, is whether the defect in that chain, if any existed, was of such a nature as to cause its condition to be in violation of the law prescribing what coupling devices should be. The section
95 applying to that is this: 'On or after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically, by impact, and which cannot be uncoupled without the necessity of a man's going between the ends of the cars.' Now, then, the question before you is the construction of that act, as the court will construe it, as applied to the facts in this case, and what the facts are with respect to the condition of that coupling apparatus, as to whether it would permit to be done what the law [prescribes] that the devices of the cars so used must permit to be done. It will be seen that this law requires that each car so used upon a common carrier, a railroad line, of the nature contemplated by the statute, and this is such a line, and in a movement contemplated by the statute, and the court instructs you that this is such a movement—should be so equipped and in such condition that it will permit the

coupling by impact and uncoupling without the necessity of going between the cars of the train. Counsel has adverted to the fact, and it appears in evidence, that the cars would from their automatic devices couple by impact—so that part of the matter is beyond your consideration. That is determined—that it was not defective in that particular respect. The question, then, comes as to whether it would uncouple without the necessity of going between the cars. Counsel here adverts to the fact, and it is undisputed in evidence, that where two cars come together there is a lever attached to each car, and on opposite sides of the train, by either of which that uncoupling can be effected. The court instructs the jury that the meaning of this law is that the device contemplated by this act is such a device as is perfect, within the operating meaning of this statute, with respect to each individual car considered as a unit, and that it is not enough that there may have been, at some other part of the train, some device which, if known or thought of or considered, might be used for the same purpose; the question is whether this car in its equipment was so complete and perfect that that could be done with respect to it that is required by this statute. Consequently, as I say, if you find that the device upon this particular car in this case, and it appears from the evidence that this chain had some connection with it and was in such a condition that the device upon that car, the lever, as it is said to be, I believe, could not be used for the purpose of uncoupling that car without the necessity of going between the cars to effect it or getting over and using some other device on another car, then that car was not in the condition it was required to be in by the law."

96 Fourth. Defendant objects and excepts to that part of the charge being in the following words:

"So that it makes no difference whether a railroad man need not have gone in there, by using a device upon some other part of the train, or whether he would have taken upon himself to act negligently and go in there, or whether the railroad company would discharge him if he did not act negligently in uncoupling these cars. These considerations have nothing to do with this case, and you should not allow yourselves to be prejudiced by the remarks of counsel on either side as to the necessity of this law, or what its effect would be in this particular case. The court wishes to remove from your minds any such prejudice. This law was passed for the purpose of protecting employees of the railroad from undue danger and from getting in a position where they would be hurt in what was deemed to be a condition or necessity, but as to what the acts of the railroad company, or what the acts of the employees might have been in a certain instance, makes no difference. The court instructs you that this car must itself have been equipped so that it could be uncoupled by the use of the device attached to it, without the necessity of going between the cars, or there was a defect within the meaning of this law."

Fifth. Defendant objects and excepts to that part of the charge being in the following words:

"The only question for you to determine, then, is whether this coupling device on this car was actually out of order, and whether it was out of order at the time this movement from the Twelfth Street yard started over into what is called the Murray, or whether it took place on the way over there after that movement started. If it was not out of order when that movement started from the Twelfth Street yard to the Murray yard—if this clevis dropped off on the way over there, when that train was actually proceeding upon that movement, and it was then discovered and fixed as soon as it reached the Murray yard, and at least before any other movement of that train or any of those cars took place, then there would be no offense here. Then your finding should be for the defendant. If, on the other hand, it was out of order at the time that train moved, at the time this train was made up and moved from this Twelfth Street yard over across the Hannibal Bridge into the Murray yard, then it was incumbent upon the defendant to have known of and had that defect remedied, because the law imposes upon the railroad company
the absolute duty, as guarantor, that its devices shall be in
97 perfect condition on all its cars in this respect, when such a
train movement, within the meaning of this law, such as this was, takes place."

Sixth. Defendant objects and excepts to that part of the charge being in the following words:

"If, of course, the chain was all right, had been inspected and was all right before that train moved, and if, as I say, then the clevis dropped off the chain, got out of order on the way over there, was then discovered or brought to the attention of the railroad company, and they fixed it immediately and before using the car in any further movement, then the railroad company has committed no offense, because the law provides that while this is going on in such a movement, when it happens in transit, and is fixed at the first time, at the first repair place, the railroad company has done all that can be expected. You will decide from the testimony brought before you what you believe the facts about that to be."

Seventh. Defendant objects and excepts to that part of the charge being in the following words:

"You have had before you two inspectors of the railroad company, Mr. Gorman and Mr. Burke, who both say—at least one of them—that on the evening before, I think the testimony is that on the evening before, but, at any rate, before the train moved or before the car was moved in this particular movement, they inspected the car and found it had nothing out of order, and that they made a notation of everything they found out of order, and that the notation did not contain any reference to the chain, as they say and testify, when they inspected it, that the chain was properly in place, and, secondly, that the device was in perfect working order. Of

the capacity of inspectors, not as assistants to the inspecting department of the railroad, not for the mere purpose of guarding against accident, because the Government could not become responsible for that, but merely to ascertain in this particular case, and in this kind of a case, whether the railroads are observing the law—whether violations are occurring, because when violations are discovered and proceedings instituted under them that has the effect—
99 tends to have the effect—and is intended to have the effect of holding the railroad companies up to a higher and better observance of their duties under this law."

Tenth. Defendant objects and excepts to that part of the charge, being in the following words:

"So that, not only had the inspectors no duty to perform in the way of informing the railroad company, but if they had done so, they would not only have violated their orders, but would have defeated the very purpose for which they are sent out there—that is, to discover whether the railroad company was obeying the law. So, you should dismiss from your minds any idea, as bearing upon this case, that there was any duty upon the inspectors so to notify the railroad company, or that they did anything wrong in any sense by failing to do so. The question was not here as to whether somebody was going to be hurt on this trip, but whether there was any defect in effect the general rule of observance upon the part of the railroad of the requirement of the law, and in order to discover it, they had to go there and see what they found and report upon it."

Eleventh. Defendant objects and excepts to that part of the charge, being in the following words:

"If you find, however, this chain was out of order before that movement started, and that the nature of that defect was such that this car, by the use of its own devices, could not be uncoupled without necessity of going between the cars of the train, or the use of some other apparatus upon some other part of the train, then your finding should be for the Government."

Twelfth. Defendant objects and excepts to that part of the charge, being in the following words:

"As I have said, a form of verdict has been prepared here, upon all four counts. As to the last three counts, the finding is to be for the plaintiff, and you are simply to sign them, by your foreman."

The COURT. Gentlemen of the jury, with respect to the use of the terms "first-class condition" and "perfect condition," as the court used them—and the court does not recall just exactly the connection—you will understand what the court means by that—a condition of the appliances in accordance with the requirements of this law. It does not refer to any other condition of the car, or what the condition of the paint is, or its furnishings, and in other
100 respects, but merely that that statement is confined entirely to the question of whether the condition was such as to conform to the requirements of this law in the respect now under consideration.

The foregoing exceptions having been duly taken before the jury retired to consider its verdict, the cause was thereupon submitted to the jury, which having retired in charge of the bailiff, returned into court a verdict finding the issues in favor of the plaintiff on each of the four counts in the complaint, which verdict was as follows:

Verdict.

We, the jury, find for the plaintiff on the issues in the first count of the petition herein.

S. R. HUMPHREY, *Foreman.*

We, the jury, find for the plaintiff on the issues in the second count of the petition herein.

S. R. HUMPHREY, *Foreman.*

We, the jury, find for the plaintiff on the issues in the third count of the petition herein.

S. R. HUMPHREY, *Foreman.*

We, the jury, find for the plaintiff on the issues in the fourth count of the petition herein.

S. R. HUMPHREY, *Foreman.*

Thereupon, on the same day, during the same term of said court, said verdict was ordered filed and entered of record, and the jurors discharged, and the cause continued until later day in the same term for judgment and further proceedings.

After the rendition of said verdict, to wit, on the day of May, 1912, during the same term of said court, defendant filed its motion for new trial, in the words and figures following:

Motion for new trial.

Now comes the defendant in the above-entitled cause and moves the court to set aside the verdict of the jury and grant a new trial herein, for the following reasons:

1. The court committed error in admitting immaterial, irrelevant, and incompetent testimony over defendant's objections and exceptions.

101 2. The court committed error in overruling each and every of defendant's demurrers as to the evidence under the first, second, third, and fourth counts, respectively, interposed at the close of all the evidence.

3. The court committed error in refusing to give defendant's peremptory instruction marked "Number 1," and in refusing to give defendant's instruction marked "Number 2," and in refusing to give defendant's instruction marked "Number 3," and in refusing to give defendant's instruction marked "Number 4"—all of which said instructions were peremptory in form—directing the jury to return verdict in favor of defendant on each of the respective counts in the complaint.

4. The court committed error in refusing to give to the jury defendant's instructions marked "Number 5," "Number 6," "Number 7," and "Number 8," respectively.

5. The court committed error in instructing and charging the jury in each and every part of its said instructions and charge, to which exceptions were duly taken and saved by defendant immediately after said charge had been made and before the jury retired to consider its verdict.

WARNER, DEAN, MCLEOD & TIMMONDS,
Attorneys for Defendant.

Thereafter, on the day of , 1912, at and during the same term of said court, said cause coming on for further proceedings, and the parties appearing by their respective attorneys, and said motion for new trial coming on for hearing, was by the court overruled, to which action of the court in overruling said motion for new trial defendant at the time objected and excepted.

Thereafter, on the day of , 1912, at and during the same term of said court final judgment was rendered by said court in said cause in the words and figures following:

Monday, July 22, 1912.

This day comes Leslie J. Lyons, United States attorney; also comes the defendant by its attorneys, Warner, Dean, McLeod & Timmonds. Thereupon the court overrules the motion for a new trial heretofore filed herein; thereupon the court, being fully advised in the premises, assesses a penalty against the Chicago, Burlington & Quincy Railroad Company of one hundred (100) dollars on each of the four counts in the petition, together with all costs of this action.

102 It is therefore considered, ordered, and adjudged by the court that the United States of America have and recover of the Chicago, Burlington & Quincy Railroad Company the sum of four hundred (400) dollars, together with all costs herein, and that execution issue therefor. It is further ordered that the defendant be granted until October 1st next, in which to file bill of exceptions, and, further, that the appeal bond be fixed in the sum of one thousand ($1,000.00) dollars.

Certificate of judge to bill of exceptions.

Thereafter, on the 30th day of September, 1912, at and during the same term of said court, and within the time allowed by said court, the defendant duly tendered this its bill of exceptions herein, which, having been seen and examined by the court and counsel, is by the court approved and in open court signed, sealed, and ordered to be made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the judge of said court before whom said proceedings were had this 30th day of September, 1912.

[SEAL.] ARBA S. VAN VALKENBURGH,
Judge of the Western Division of the Western District of Missouri.

The above and foregoing bill of exceptions is approved.

HUGH C. SMITH,
Assistant United States District Attorney for Western Division of the Western District of Missouri.

(Endorsed:) Bill of exceptions. Let the bill be filed and the filing shown of record this day. Arba S. Van Valkenburgh, district judge. Filed September 30th, 1912. John B. Warner, clerk, by Elizabeth Linton, D. C.

Assignment of errors—Filed in the District Court on Sept. 30, 1912.

Thereupon, and afterwards, to wit, on the 27th day of July, 1912, comes defendant, Chicago, Burlington & Quincy Railroad Company, by its attorneys, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

In that the court committed error in refusing to sustain and
103 in overruling the demurrer to the evidence, as applied to the first count of the complaint, interposed and filed by the defendant at the close of all of the evidence.

To which ruling of the court defendant at the time duly excepted and now assigns the same as error.

II.

In that the court erred in refusing to sustain and in overruling the demurrer to the evidence, as applied to the second count of the complaint interposed and filed by the defendant at the close of all the evidence.

To which ruling of the court defendant at the time duly excepted and now assigns the same as error.

III.

In that the court erred in refusing to sustain and in overruling the demurrer to the evidence, as applied to the third count of the complaint, interposed and filed by defendant at the close of all the evidence.

To which ruling of the court defendant at the time duly excepted and now assigns the same as error.

IV.

In that the court erred in refusing to sustain and in overruling the demurrer to the evidence, as applied to the fourth count of the complaint interposed and filed by the defendant at the close of all the evidence.

To which ruling of the court defendant at the time duly excepted and now assigns the same as error.

V.

In that at the close of the trial when the cause was submitted to the jury the court denied the motion and request in writing then and there made by the defendant to charge the jury as follows:

No. 1.

"The court instructs and charges the jury that under the pleadings and the evidence in this case you should return a verdict in favor of the defendant company on the first count of the complaint."

To which action of the court in refusing to so instruct and charge the jury defendant then and there excepted and now assigns the same as error.

104 VI.

In that at the close of the trial when the cause was submitted to the jury the court denied the motion and request in writing then and there made by the defendant to charge the jury as follows:

No. 2.

"The court instructs and charges the jury that under the pleadings and the evidence in this case you should return a verdict in favor of the defendant company on the second count of the complaint."

To which action of the court in refusing to so instruct and charge the jury the defendant then and there excepted and now assigns the same as error.

VII.

In that at the close of the trial when the cause was submitted to the jury the court denied the motion and request in writing then and there made by the defendant to charge the jury as follows:

No. 3.

"The court instructs and charges the jury that under the pleadings and the evidence in this case you should return a verdict in favor of the defendant company on the third count of the complaint."

To which action of the court in refusing to so instruct and charge the jury the defendant then and there excepted and now assigns the same as error.

VIII.

In that at the close of the trial when the cause was submitted to the jury the court denied the motion and request in writing then and there made by the defendant to charge the jury as follows:

No. 4.

"The court instructs and charges the jury that under the pleadings and the evidence in this case you should return a verdict in favor of the defendant company on the fourth count of the complaint."

To which action of the court in refusing to so instruct and charge the jury the defendant then and there excepted and now assigns the same as error.

105

IX.

In that, at the close of the trial, when the cause was submitted to the jury, the court denied the motion and request in writing, then and there made by the defendant, to charge the jury as follows:

No. 5.

"The court instructs and charges the jury relative to the first count in the complaint that, although you may believe from the evidence that the uncoupling chain referred to in said count was disconnected from the lock block, as alleged in said complaint, yet, if, notwithstanding that fact, you shall further believe from the evidence that the car, with the chain in that condition, might and could be coupled with other cars automatically by impact and might and could be uncoupled from other cars without the necessity of a man or men going between the ends of the cars, then it is your duty to return a verdict in favor of the defendant railroad company on said first count."

To which action of the court in refusing to so instruct and charge the jury, the defendant then and there excepted and now assigns the same as error.

X.

In that, at the close of the trial, when the cause was submitted to the jury, the court denied the motion and request in writing, then and there made by defendant, to charge the jury as follows:

No. 6.

"The court instructs and charges the jury that if you shall believe from the evidence that the uncoupling chain referred to in the first count or cause of action was properly connected to and with the lock block therein referred to when received by defendant, and that it became disconnected from said lock block while being moved by defendant on its tracks; and that such disconnection was first discovered by defendant or its employees after the car had arrived at and was in defendant's switch yards known as "Murray yards," referred to in the testimony, and that it was then and there by defendant immediately again properly connected before said car was further hauled or moved, then it is your duty to return a verdict in favor of the defendant on said first count or cause of action."

To which action of the court in refusing to so instruct and charge the jury, the defendant then and there excepted and now assigns the same as error.

106 XI.

In that, at the close of the trial, when the cause was submitted to the jury, the court denied the motion and request in writing then and there made by the defendant, to charge the jury as follows:

No. 7.

"The court instructs and charges the jury that if you shall believe that the cars referred to in the second, third, and fourth counts of the complaint, and also referred to by the witnesses as 'drags,' 'cuts,' or 'transfers,' were moved or hauled by the defendant upon its own tracks and wholly within its own switch yards, and that the only movements thereof were switching movements necessary to be made in the breaking up of trains coming into such switch yards, and the making up of trains to depart therefrom, then you should return a verdict in favor of the defendant on said second, third, and fourth counts."

To which action of the court, in refusing to so instruct and charge the jury, the defendant then and there excepted and now assigns the same as error.

XII.

In that, at the close of the trial, when the cause was submitted to the jury, the court denied the motion and request in writing then and there made by the defendant, to charge the jury as follows:

No. 8.

"The court instructs and charges the jury, relative to the second, third, and fourth counts or causes of action set forth in the complaint, that if you shall believe from the evidence that none of the

strings of cars referred to in the complaint and referred to in the testimony as 'drags,' 'cuts,' or 'transfers,' were 'trains,' then it is your duty to return a verdict as to each and every of said second, third, and fourth counts, in favor of the defendant. And in this connection the court further instructs and charges you that if you shall believe from the evidence that in the railroad business the word 'train' has, among railroad men and in railroad parlance in the United States, a fixed, definite, and technical meaning, and so had such meaning on and before March 2, 1893, then it will be and is your duty to apply and give to that word, as used herein and in other parts of these charges and instructions, such meaning; and if, by using and applying such meaning, you shall find and believe that none of the strings of cars above referred to constitute a 'train' in such railroad parlance, then it is your duty to re-
107 turn a verdict in favor of the defendant company as to each and every of said second, third, and fourth counts."

To which action of the court, in refusing to so instruct and charge the jury, the defendant then and there excepted, and now assigns the same as error.

XIII.

In that the court, in its charge, erroneously instructed the jury as to the law applicable to the issues in said cause, that is to say, in the following words, part of the charge:

"As has been stated to you, this complaint or petition on behalf of the Government contains four counts or causes of action, and as has also been said to you by counsel, the court has determined that the law is such, under the facts that have been presented here, that the verdict must be for the plaintiff—that is, the United States—upon the last three counts of the complaint—that is, the second, third, and fourth; so that it is unnecessary for you to consider that question, which is the coupling up of the air on the trains, at all.

"The court has had prepared a form of verdict as to those last three counts. It will be your duty merely to sign those forms relating to those three counts as prepared, by your foreman."

To which action of the court in so charging the jury, and to the portion of the charge last above set forth, beginning with the words "As has been stated" and ending with the words "By your foreman," defendant at the time excepted and now assigns the same as error.

XIV.

In that the court, in its charge erroneously instructed the jury as to the law applicable to the issues in said cause, that is to say, in the following words, part of the charge:

"The question before you now is as to whether there has been any violation of this law, entitling plaintiff, the United States, to recover upon the first count of the complaint, or whether your verdict should be for the defendant. This first count concerns the ques-

tion of whether this car, marked 'A., T. & S. F. No. 19,060'—as the court remembers it—was moved in this movement, in this train, in such manner as to constitute a violation of the law because of a defect in its coupling appliances. Counsel has told you truly that it does not matter, for the purposes of this consideration, what sort of a device was used, or whether it included a chain or not, but the evidence is that the particular device used did include a chain, and the consideration then is whether the defect in that chain, if
108 any existed, was of such a nature as to cause its condition to be in violation of the law prescribing what coupling devices should be. The section applying to that is this: 'On or after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line, any car used in moving interstate traffic, not equipped with couplers coupling automatically, by impact, and which can not be uncoupled without the necessity of a man's going between the ends of the cars.' Now then, the question before you is the construction of that act, as the court will construe it, as applied to the facts in this case, and what the facts are with respect to the condition of that coupling apparatus, as to whether it would permit to be done, what the law prescribes that the devices of the cars so used must permit to be done. It will be seen that this law requires that each car so used upon a common carrier, a railroad line, of the nature contemplated by the statute—and this is such a line—and in a movement contemplated by the statute—and the court instructs you this is such a movement—should be so equipped and in such a condition that it will permit the coupling by impact and uncoupling without the necessity of going between the cars of the train. Counsel has adverted to the fact, and it appears in evidence that the cars would from their automatic devices couple by impact; so that part of the matter is beyond your consideration. That is determined—that it was not defective in that particular respect. The question then comes as to whether it would uncouple without the necessity of going between the cars. Counsel here adverts to the fact, and it is undisputed in evidence, that where two cars come together there is a lever attached to each car, and on opposite sides of the train, by either of which that uncoupling can be effected. The court instructs the jury that the meaning of this law is that the device contemplated by this act is such a device as is perfect, within the operating meaning of this statute, with respect to each individual car considered as to unit and that it is not enough that there may have been, at some other part of the train, some device which, if known or thought of, or considered, might be used for the same purpose; the question is whether this car, in its equipment, was so complete and perfect that that could be done with respect to it that is required by this statute. Consequently, as I say, if you find that the device upon this particular car, in this case—and it appears from the evidence, that this chain had some connection with it, and was in such a condition that the device upon that car, the lever, as it is said to be, I believe—could

not be used for the purpose of uncoupling that car without the necessity of going between the cars to effect it, or getting over and using some other device on another car, then that car was not in the condition it was required to be in by the law."

109 To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "the question before you" and ending with the words "by the law," the defendant at the time excepted and now assigns the same as error.

XV.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause, that is to say, in the following words, part of the charge:

"So that it makes no difference whether a railroad man need have gone in there, by using a device upon some other part of the train, or whether he would have taken upon himself to act negligently and go in there, or whether the railroad company would discharge him if he did not act negligently in uncoupling these cars. Those considerations have nothing to do with this case, and you should not allow yourselves to be prejudiced by the remarks of counsel on either side as to the necessity of this law, or what its effect would be in this particular case. The court wishes to remove from your minds any such prejudice. This law was passed for the purpose of protecting employees of the railroad from undue danger and from getting in a position where they would be hurt in what was deemed to be a condition of necessity, but as to what the acts of the railroad company or what the acts of the employees might have been in a certain instance makes no difference. The court instructs you that this car must itself have been equipped so that it could be uncoupled by the use of the device attached to it without necessity of going between the cars, or there was a defect within the meaning of this law."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "So that it makes no difference" and ending with the words "of this law," the defendant at the time excepted and now assigns the same as error.

XVI.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause, that is to say, in the following words, part of the charge:

"The only question for you to determine, then, is whether this coupling device on this car was actually out of order, and whether it was out of order at the time of this movement from the Twelfth Street yard and started over into what is called the Murray yard, or whether it took place on the way over there after that movement

started. If it was not out of order when that movement
110 started from the Twelfth Street yard to the Murray yard—
if this clevis dropped off on the way over there, when that train was actually proceeding upon that movement, and it was then discovered and fixed as soon as it reached the Murray yard, and at least before any other movement of that train or any of those cars took place, then there would be no offense here. Then your finding should be for the defendant. If, on the other hand, it was out of order at the time that train moved, at the time this train was made up and moved from this Twelfth Street yard over across the Hannibal Bridge into the Murray yard, then it was incumbent upon the defendant to have known of and had that defect remedied, because the law imposes upon the railroad company the absolute duty, as guarantor, that its devices shall be in perfect condition on all its cars in this respect when such a train movement, within the meaning of this law, such as this was, takes place."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "The only question" and ending with the words "takes place," the defendant at the time excepted and now assigns the same as error.

XVII.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause, that is to say, in the following words, part of the charge:

"If, of course, the chain was all right, had been inspected and was all right before that train moved, and if, as I say, then the clevis dropped off the chain, got out of order on the way over there, was then discovered or brought to the attention of the railroad company, and they fixed it immediately, and before using the car in any further movement, then the railroad company has committed no offense, because the law provides that while this is going on in such a movement, when it happens in transit, and is fixed at the first time, at the first repair place, the railroad company has done all that can be expected. You will decide from the testimony brought before you what you believe the facts about that to be."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "If, of course," and ending with the words "that to be," the defendant at the time excepted and now assigns the same as error.

XVIII.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause, that is to say, in the following words, part of the charge:

111 "You have had before you two inspectors of the railroad company, Mr. Gorman and Mr. Burke, who both say—at least

one of them—that on the evening before, I think the testimony is, that on the evening before, but at any rate before the train moved or before the car was moved in this particular movement, they inspected the car and found it had nothing out of order, and that they made a notation of everything they found out of order, and that the notation did not contain any reference to the chain, so they say and testify, when they inspected it; that the chain was properly in place; and, secondly, that the device was in perfect working order. Of course you are to find also, from the testimony, and the court believes that is undisputed, that the chain in place, with the use of that clevis, was essential to the working apparatus upon that particular car for the purpose of uncoupling the car without the necessity of going between the cars. That also is a matter for your determination. Mr. Starbird and Mr. Gibbs, the inspectors on behalf of the Government, both testified that shortly before the train moved, practically almost before it moved, they inspected this train, looking among the cars, and found that this chain was then out of order; that this clevis was not there, and the attachment was not such that the lever would work. They say they rode over with the train, and when they got over there it was still in the same condition. Mr. Starbird says he called the attention of the local inspector in the Murray yards to this matter, and that he immediately got a clevis and put it on and fixed it. It is unimportant whether it was fixed easily or could be fixed easily. The question is, What was its importance in the running of this device?"

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "You have had before you" and ending with the words "Of this device," the defendant at the time excepted and now assigns the same as error.

XIX.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause; that is to say, in the following words, part of the charge:

"It is necessary, and the courts in construing the law have so found, as I have said, that the duty devolves absolutely upon the railroad company to see that these devices upon its trains, when they go upon the movements, shall be in first-class condition, and that if they are not, and it goes upon a movement, it is unnecessary to inquire whether they have used what would ordinarily be
112 called diligence, whether they have made inspection, or what they have done, because it is well known that if that always had to be proved that there had been absence of diligence, it would greatly complicate the enforcement of this law, and the courts have held that the law, in order to be enforced in accordance with the true tenor, spirit, and purpose, must be held to fix an absolute duty upon the railroad company, and that if that is absent under certain circum-

stances and in a certain instance it would constitute a violation if the defect existed; that then they must be responsible."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "It is necessary" and ending with the words "must be responsible," the defendant at the time excepted and now assigns the same as error.

XX.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause; that is to say, in the following words, part of the charge:

"Now, as to the duty of these inspectors, the court feels bound to say to you, in light of the argument that has been made to you, that there was no duty upon the part of these inspectors to inform the railroad company of what they discovered as the train was standing in the Twelfth Street yard. It is a fact that this law could not be enforced, could not be held up to a high standard of effectiveness, if there was not inspection authorized and put into force by the Government, by the Interstate Commerce Commission, which has that duty in charge to see that the law was being enforced and discover whether railroads were negligent in observing it. For that reason it is necessary to send out inspectors, not in the capacity of inspectors, not as assistants to the inspecting department of the railroad, not for the mere purpose of guarding against accident, because the Government could not become responsible for that, but merely to ascertain in this particular case, and in this kind of a case, whether the railroads are observing the law, whether violations are occurring, because when violations are discovered and proceedings instituted under them that has the effect—tends to have the effect—and is intended to have the effect, of holding the railroad companies up to a higher and better observance of their duties under this law."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the
113 words "Now as to the duty" and ending with the words "under this law," the defendant at the time excepted and now assigns the same as error.

XXI.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause; that is to say, in the following words, part of the charge:

"So that not only had the inspectors no duty to perform in the way of informing the railroad company, but if they had done so they would not only have violated the orders but would have defeated the very purpose for which they are sent out there; that is, to discover whether the railroad company was obeying the law. So you should dismiss from your minds any idea, as bearing upon

this case, that there was any duty upon the inspectors so to notify the railroad company, or that they did anything wrong in any sense by failing to do so. The question was not here as to whether somebody was going to be hurt on this trip, but whether there was any defect—in effect, the general rule of observance upon the part of the railroad of the requirement of the lay—and in order to discover it they had to go there and see what they found and report upon it."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "So that" and ending with the words "report upon it," the defendant at the time excepted and now assigns the same as error.

XXII.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause; that is to say, in the following words, part of the charge:

"If you find, however, this chain was out of order before that movement started, and that the nature of that defect was such that this car, by the use of its own devices, could not be uncoupled without necessity of going between the cars of the train, or the use of some other apparatus upon some other part of the train, then your finding should be for the Government."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "If you find" and ending with the words "for the Government," the defendant at the time excepted and now assigns the same as error.

114

XXIII.

In that the court in its charge erroneously instructed the jury as to the law applicable to the issues in said cause; that is to say, in the following words, part of the charge:

"As I have said, a form of verdict has been prepared here upon all four counts. As to the last three counts, the finding is to be for the plaintiff, and you are simply to sign them, by your foreman."

To which action of the court in so charging the jury and to that portion of the charge last above set forth, beginning with the words "As I have said" and ending with the words "your foreman," the defendant at the time excepted and now assigns the same as error.

XXIV.

In that the court erred in overruling the motion for new trial filed by the defendant and in refusing to set aside the verdict and grant it a new trial for the reasons in said motion set forth.

To which action of the court in overruling said motion for new trial defendant at the time excepted and now assigns the same as error.

Wherefore the defendant, Chicago, Burlington& Quincy Railroad Company, now prays that the said judgment of the District Court of the United States for the Western Division of the Western District of Missouri be reversed by the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and that the said cause be remanded to the District Court for such further proceeding therein as may be in conformity with justice.

WARNER, DEAN, MCLEOD & TIMMONDS,
Attorneys for Defendant Chicago,
Burlington & Quincy Railroad Company.

O. M. SPENCER,
H. C. TIMMONDS,
Of Counsel.

Petition for writ of error filed in the District Court on Sept. 30, 1912.

The Chicago, Burlington & Quincy Railroad Company, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered and penalty assessed
115 therein, on the 22nd day of July, 1912, comes now, by its attorneys, and petition the court for an order allowing it to prosecute a writ of error to the honorable the United States Circuit Court of Appeals for the Eighth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error; that upon the giving of such security all further proceedings in [thie] court be suspended and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Eighth Circuit, and your petitioner will ever pray.

WARNER, DEAN, MCLOED & TIMMONDS,
Attorneys for Defendant Chicago,
Burlington & Quincy Railroad Company.

O. M. SPENCER,
H. C. TIMMONDS,
Of Counsel.

Supersedeas bond filed in the District Court on Sept. 30, 1912.

Know all men by these presents: That we, Chicago, Burlington & Quincy Railroad Company, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars ($1,000), to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Whereas, lately at the April term, A. D. 1912, of the District Court of the United States for the Western Division of the West-

ern District of Missouri, in a suit depending in said [suit] between the United States of America, plaintiff, and the Chicago, Burlington & Quincy Railroad Company, defendant, a judgment was rendered against the said Chicago, Burlington & Quincy Railroad Company, and the said Chicago, Burlington & Quincy Railroad Company has obtained a writ of error from the United States Circuit Court of Appeals to reverse the judgment in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the said United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, in the city of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

116 Now, the condition of the above obligation is such that if the said Chicago, Burlington & Quincy Railroad Company, shall appear either in person or by its attorney, in the said United States Circuit Court of Appeals for the Eighth Circuit, on such day or days as may be appointed for the hearing of said cause in said court, and prosecute its writ of error, and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit, in said cause, and shall pay the judgment aforesaid as said court may direct, if the judgment against it shall be affirmed, and shall answer all damages and costs if it fail to make good its appeal; and if it shall appear for trial in the District Court of the United States for the Western Division of the Western District of Missouri on such day or days as may be appointed for retrial by said District Court, and shall abide by and obey all orders made by said court, provided the judgment against it be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, then the above obligation to be void, otherwise to remain in full force, virtue, and effect.

Sealed with our seals and dated this 30th day of September in the year of our Lord, one thousand nine hundred and twelve.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By H. C. TIMMONDS,
Its Attorney and Agent, hereunto duly authorized.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By J. L. CROSS.

[SEAL.]

The foregoing bond approved and ordered to act as supersedeas this 30th day of September, 1912.

ARBA S. VAN VALKENBURGH,
Judge of the United States District Court for Western Division of Western District of Missouri.

Election to have record printed by clerk of United States Circuit Court of Appeals—filed in the District Court on Oct. 5, 1912.

Now comes the defendant in the above-entitled cause and hereby waives the printing of the record herein, under the provisions of the

act of Congress, entitled "An act to diminish the expense of
117 proceedings on appeal, and writ of error, or of certiorari,"
and elects to have said record printed by the Clerk of the United States Circuit Court of Appeals.

WARNER, DEAN, MCLEOD & TIMMONDS,
Attorneys for Defendant.

Clerk's certificate to transcript.

UNITED STATES OF AMERICA, *sct:*

I, John B. Warner, clerk of the United States District Court for the Western Division of the Western District of Missouri, do hereby certify the foregoing to be a full, true, and complete copy of the record, bill of exceptions, assignment of errors and all proceedings in the said court in the case of the United States of America vs. Chicago, Burlington & Quincy Railroad Company, No. 302, as fully as the same appears on file and of record in my office. And I further certify that the original citation and writ of error in this cause are prefixed hereto and transmitted herewith.

Witness my hand as clerk and the seal of said District Court.

[Seal U. S. District Court, Western Division, Western District of Missouri.]

Done at office, in Kansas City, in said district, this 27th day of November, A. D. 1912.

JOHN B. WARNER,
Clerk U. S. District Court.

Filed Nov. 29, 1912. John D. Jordan, clerk.

118 *Appearance of counsel for plaintiff in error.*

United States Circuit Court of Appeals, Eighth Circuit.

CHICAGO, BURLINGTON & QUINCY RAILROAD Company, plaintiff in error,
vs.
THE UNITED STATES OF AMERICA. } No. 3892.

The clerk will enter my appearance as counsel for the plaintiff in error.

O. M. SPENCER,
St. Joseph, Mo.
O. H. DEAN,
H. C. TIMMONDS,
Kansas City, Mo.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Dec. 2, 1912.

Appearance of Messrs. Lyons and Smith as counsel for the defendant in error.

The clerk will enter my appearance as counsel for the defendant in error.

LESLIE J. LYON, *U. S. Atty.*
HUGH C. SMITH, *Asst. U. S. Atty.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals Feb. 26, 1913.

Appearance of Mr. Philip J. Doherty as counsel for the defendant in error.

The clerk will enter my appearance as counsel for the defendant in error.

PHILIP J. DOHERTY.
Special Assistant to United States Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Mar. 10, 1913.

119 *Order of submission.*

May term, 1913.

WEDNESDAY, *May 28, 1913.*

This cause having been called for hearing in its regular order, argument was commenced by Mr. H. C. Timmonds for plaintiff in error, continued by Mr. Hugh C. Smith and Mr. Philip J. Doherty for defendant in error, and concluded by Mr. H. C. Timmonds for plaintiff in error.

Thereupon this cause was submitted to the court on the transcript of record from said District Court and the briefs of counsel filed herein, and by consent of counsel for each party in open court it is now ordered that the record and briefs in this cause be submitted to a third judge of this court.

120 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

September term, A. D. 1913.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, plaintiff in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 3892.

In error to the District Court of the United States for the Western District of Missouri.

Mr. H. C. Timmonds (Mr. William Warner, Mr. O. H. Dean, and Mr. W. D. McLeod on the brief) for plaintiff in error.

Mr. Hugh C. Smith and Mr. Philip J. Doherty (Mr. Leslie J. Lyons on the brief), for defendant in error.

Before HOOK and CARLAND, circuit judges, and AMIDON, district judge.

AMIDON, district judge, delivered the opinion of the court:

The Government brought this action to recover penalties for violations of the safety-appliance act, 27 Stat. at Large, 531, as amended; 29 Stat. at Large, 85, and 32 Stat. at Large, 943.

The first count is based upon section 2. It charges defendant with using on its line a car when the coupling apparatus of the "A" end thereof was out of repair and inoperative. The issues upon this count were submitted to a jury and resulted in a verdict in favor of the Government upon which judgment was entered in the sum of $100.

The car was moved from the Twelfth Street yard in Kansas City, Missouri, across the Missouri River, over the bridge and main line of the company to the Murray Street yard. The
121 evidence was quite clear that at the time the movement started the coupling apparatus was out of repair and continued so throughout the movement. It is first urged by the company that this movement was a switching operation and not "on the line" of the company within the meaning of the statute; in other words, that section 2 of the act does not relate to the movement of cars in switching. The coupling and uncoupling of cars, however, is confined almost wholly to such operations, and to hold that it is not a violation of the law to have the coupling and uncoupling apparatus in a defective condition at such times would be a clear nullification not only of the language of the statute but of its manifest purpose. This assignment of error is, therefore, wholly devoid of merit.

It was also shown that the coupling apparatus on the car to which the car in question was coupled was in perfect condition, and that the two cars could have been uncoupled by the use of the lever on the first mentioned car, and for this reason it is urged that the cars could be uncoupled "without the necessity of men going between the ends of the cars," and hence there was no violation of section 2. That section, however, makes it a crime to use "any car" upon which the coupling apparatus is not operative, and we think that under this statute every car is a unit and must have its coupling apparatus in condition. Norfolk & W. Ry. Co. v. U. S., 177 Fed., 623. The argument of plaintiff in error in support of this contention is based mainly upon the decisions of this court in Morris v. Duluth, S. S. & A. Ry Co., 108 Fed., 747; Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed., 529; Suttle v. Choctaw, O. & G. R. R. Co., 144 Fed., 668; and Union Pacific Ry. Co., v. Brady, 161 Fed., 719. In those cases it was held that a switchman was guilty of contributory negligence in going between cars to uncouple them if the lever upon either car was operative. The opinions contain no sug-

gestion, however, that the company in suffering the coupling appliance upon one car to be inoperative was not guilty of a violation of the safety-appliance act. On the contrary, all those decisions proceed upon the ground that the company was guilty of such a violation of the law, but held that the plaintiff was guilty of contributory negligence which defeated his right of recovery because, notwithstanding the company's breach of duty, there was a safe way in which the employe could have uncoupled the cars, and he was bound to choose that way rather than the dangerous method of going between the cars.

122 The company also urges that the car in question comes within the proviso of section 4 of the act of April 14, 1910, 36 Statutes at Large, 298. That proviso enacts that where any car shall have been properly equipped, as provided in the act, "and such equipment shall have become defective or insecure while such car is being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment is first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties, * * * if such movement is necessary to make such repairs, and such repairs cannot be made, except at such repair points." The evidence tended to show that the car was received by defendant from the Atchison, Topeka and Santa Fe Railroad Company at Kansas City; that before it was received it was inspected and found to be in proper condition, and that the company first learned that the coupling appliance was out of repair after the car had been moved into the Murray yard. There was evidence, however, on the part of the Government inspectors that they examined the car while it was in the Twelfth Street yard and found it in a defective condition; that they accompanied it to the Murray Street yard, and there informed the company's employes of its defective condition, who thereupon promptly supplied the defective part. The trial court submitted to the jury the question whether the car was defective when it started from the Twelfth Street yard or became defective in the course of its journey from that yard to the Murray yard, charging them that if the defect arose while the car was in transit, the company would not be liable. The jury accepted the testimony of the Government inspectors and found that the car was defective before it started upon the movement complained of. It is quite clear, therefore, that the company is not protected by the proviso upon which it relies. That is so for two reasons: First, the defect was of a character that could have been supplied in the Twelfth Street yard. It consisted of a small clevis which had fallen out of the coupling appliance. This could have been supplied as well in one yard as the other, and a car can be moved for purposes of repair under the proviso only when such a movement is necessary; that is, when the repair is of a character which requires the taking of the car to some particular point. Second, the movement which is per-

mitted must be for the purpose of making repairs, and the evidence showed that the movement complained of was not of that character.

123 The company also urges that it was the duty of the Government inspectors when they discovered the defective condition of the car in the Twelfth Street yard to inform the company's employes, so that the defect could be supplied before the car was moved. Such a ruling would make it almost impossible for the Government to enforce the statute. It would be difficult, indeed, to show at the conclusion of a trip that the car was defective when the movement started. Such evidence could only be obtained from railway employes and, as a rule, would show that the witnesses themselves were guilty of negligence in not remedying a known defect. Government inspectors are no part of the company's repair force. It is their duty to ascertain whether or not the company is violating the statute. They can do that effectively in no other way than that adopted by the inspectors in the present case.

The trial court committed no error as to the first count, and its judgment upon that count is therefore affirmed.

Counts two, three, and four are based on section 1 of the safety-appliance act, 27 Stat. at Large, 531, as amended by section 2 of the act of March 2, 1903, 32 Stat. at Large, 943. The first statute provides as follows: "That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power drive-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 2 of the act of March 2, 1903, fixes the minimum percentage of cars having air brakes coupled up at fifty per cent, and empowers the commission, after full hearing, to increase that minimum percentage, and makes a failure to comply with any such requirement of the Interstate Commerce Commission subject to the like penalty as failure to comply with any requirement of the statute. After the passage of this act the Interstate Commerce Commission promulgated a regulation fixing the minimum of cars having air brakes coupled at seventy-five per cent of the train.

124 The second cause of action charges the defendant with moving a transfer train consisting of forty-two cars engaged in interstate traffic, having only nine cars upon which the air was coupled up. The third cause of action charges the movement of a similar train consisting of thirty-six cars having only ten cars upon which the air was coupled up. The fourth cause of action charges the movement of such a train containing thirty-nine cars and having the air coupled up on only nine cars.

The evidence showed that each of these trains was in charge of a switching crew, was hauled by a switch engine, had no caboose, and had not been moved as a train over defendant's line, nor was it intended to be moved as a train. Defendant has two yards at Kansas City, Missouri, one known as the Twelfth Street yard, south of the Missouri River, and the other the Murray yard north of that river. These two yards together constitute a terminal yard. Trains coming in from the west are broken up in the Twelfth Street yard, and such cars as are to go forward to eastern points are distributed upon tracks according to the practice in modern railroading. Strings of these cars are then drawn out at the eastern end of the system of tracks by a switch engine and transferred to the Murray yard, where they are again redistributed according to the connecting carriers who are to move them forward to eastern points. The distance between the yards is about two miles. The line on the bridge across the Missouri River is a single line and is about 3,000 feet long. The tracks between the two yards are intersected by the terminal road at Kansas City. The line across the bridge is used not only by defendant, but by the Wabash and Rock Island Railroad Companies for both freight and passenger trains. The movement of trains in this territory is controlled by block signals. Trains such as those here complained of have no schedule and are not under the control of the train dispatcher, but are moved by the yardmaster. The principal issue upon these counts was whether trains of the character described are subject to the provisions of the law requiring seventy-five per cent of the air brakes to be coupled up. The trial court held that they were and directed the jury to return a verdict in favor of the Government. This action of the court is the principal ground of error assigned upon these counts.

It is not controverted by the Government that the provisions of the safety-appliance act in regard to air brakes have not here-
125 tofore been regarded as applicable to switching operations. This has been the interpretation of executive officers charged with the enforcement of the act and is justified by the language of the statute. The words "on its line," "in moving interstate traffic," "to run any such train in such traffic," are properly applicable to trains moving from point to point rather than to switching operations. We do not think the act of 1903 was intended to make any change in the original statute in this respect. That statute was passed to correct the decision of this court in the case of Southern Pacific Railway Co. v. Johnson (117 Fed., 462) and was mainly declaratory. Johnson v. Southern Pacific (196 U. S., 1, 21).

The controversy here presented has arisen because of a change in the method of doing switching at important terminal points since the passage of the statute. When the act was passed terminal yards consisted of main tracks and a system of sidings upon which cars were moved by the old "push and pull" system. Even in such yards the main tracks of the road were used to a considerable extent in switch-

ing operations. The immense increase in the volume and density of traffic upon American railroads since 1898 has compelled a complete reconstruction of terminals at all important points. These terminals now consist of at least two systems of ladder tracks operated by gravity or by the hump and gravity systems combined. In one of these yards incoming trains are broken up and the cars distributed upon different sidings according to their destination. From these sidings strings of cars are pulled out and moved forward to another system of tracks constructed upon the same plan as the first and there distributed upon sidings so as to constitute trains to be carried forward by connecting carriers. For trains moving in the opposite direction the process is simply reversed. Another ladder of sidings in the yard in which the cars were assembled into trains becomes a yard for classification, and the classification yard becomes the yard in which cars are assembled into trains to be carried forward in the opposite direction. In this reconstruction of terminals old yards have as a rule been used as one end of the system, and carriers have been compelled to go considerable distances to find land that could be acquired at any reasonable price for the other end. While the record is silent on the subject, we have no doubt that this was the reason for the location of the Murray yard across the river. Standard works such as Droege's Freight Terminals and Trains, published in
126 1912, give the history of this development and the construction of present-day terminals and the methods of handling cars therein. The double system of yards above described is the simplest form now in use, and in important terminals, instead of there being two yards, the traffic has compelled the construction of several yards. In the publication referred to such yards are described with drawings, which make both their structure and method of operation much more plain than any verbal description. This combination of yards constitutes a single terminal yard and is just as indispensable in the switching of freight cars at the present time as the old system of sidings was a few years ago.

This case was tried mainly by the dictionary. We have much reasoning of counsel upon general principles. What we would have preferred would be an accurate description of the development of the terminal yards at Kansas City, the present structure of those yards, the method of handling trains therein; the speed at which transfer trains are moved between the yards; the control over such trains afforded by the coupling up of the air upon a part of the cars only; whether in actual practice, with the air coupled up on six to ten cars, the engineer can control the speed of these transfer trains from the locomotive "without requiring brakemen to use the common handbrakes for that purpose;" what, if any, accidents have resulted from the failure to couple up seventy-five per cent of the air; the time that would be consumed in coupling up seventy-five per cent of the air on such trains; the number of trains that are moved in the yard; the effect upon the movement of cars in such ter-

minal yards if seventy-five per cent of the air had to be coupled up on all these strings of cars. In other words, the evidence should do all that could be done to place the court in the same position as an experienced railroad man in judging of these transportation questions. Instead of reasoning from such a disclosure of the actual facts the attempt is made to deduce the decision of the case from the definition of the word "train" by a process of abstract reasoning. One fundamental trouble with such reasoning is that it proves too much. The word "train" of course covers any string of cars hauled by an engine. But if the statute is to be applied to all trains falling within this definition, then it would cover all movements of cars by means of a locomotive in switching operations, and it would make no difference whether that movement was on a main track or a siding. Such a result reduces the reasoning to an
127 absurdity, because its application to railroads would operate as an embargo upon commerce. Because of these results, as well as from the language of the statutes, we are of the opinion that the air-brake sections of the safety-appliance acts were not intended to apply to switching operations. But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the new conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars moved by a switch engine from one yard to another in the breaking up and making up of trains shall be subject to the air-brake provisions of the safety-appliance acts, Congress ought so to provide. The whole question turns upon two points. First, do the air-brake provisions of the safety-appliance acts apply to switching operations? Second, was the movement of the strings of cars here involved a good faith switching operation? We are satisfied that the movement of these trains was as genuinely a switching operation as the old movement when terminal yards were less extended than they are now. Being of that opinion and that the air-brake sections of the safety-appliance acts were not intended to apply to switching movements we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff.

At no time since the passage of the safety-appliance act in 1893 has it been the practice to couple up the air upon cars which were being moved in switching operations. This has been equally true whether the movement was upon sidings or upon main lines. At any time during the period referred to it has been possible to see hourly, not only at terminal points, but at any divisional point, such trains moving from one yard to another over the main lines of the road without coupling up the air. The same is true of trains moving from the yards of one carrier to yards of a connecting carrier at the same divisional point. It is true that such yards, as a rule,

are less distant from each other than yards in the great terminal systems of important centers of traffic. It seems to us, however, impossible for courts to develop different rules according to the length or character of the main line that is used in such operations. The statute attempts to make no such classification, and, in our judgment, courts would be guilty of palpable legislation if they should attempt to do so.

128 The most difficult problem that confronts railroads at the present time is to prevent strangulation of the arteries of commerce at these great terminal points. The traffic of half the continent at certain season of the year rushes down upon these centres. Thousands of cars have to be distributed and recombined daily in these terminal yards. There is no evidence in this record as to the time that would be consumed in coupling up seventy-five per cent of the air on these transfer trains, but it was shown in a similar case, Erie Railroad Company v. United States, 197 Fed., 287, that it would take at least half an hour. In cold weather it would take considerably more than that time. The movement of the trains from one yard to the other at the rate of six to eight miles an hour would take less than twenty minutes. The result is that nearly twice the time would be consumed in coupling up the air that is needed for the brief movement of the train, and this with the clear certainty that at the end of the journey the air would have to be again uncoupled in order to distribute the cars. If such delay is necessary for public safety all will agree that safety should be placed above speed. But considering the shortness of the journey and the slowness of the speed, there is no evidence in this record that the safety of the public or of employes requires the coupling up of seventy-five per cent of the air on these transfer trains. Furthermore, the question is for Congress and not for the courts.

The identical question which is here presented was before the Circuit Court for the Third Circuit in Erie Railroad Company v. United States, 197 Fed., 287, and, we think, was there properly decided, nothwithstanding its criticism in United States v. Pere Marquette R. R. Co., in the District Court of the United States for the Western District of Michigan, decided September 5, 1913.

The judgment of the trial court as to causes of action two, three, and four is reversed, with directions to grant a new trial.

Filed November 28, 1913.

HOOK, circuit judge, dissenting in part:

I am unable to concur in the conclusions of the court upon the second, third, and fourth counts which charge defendant with moving on its line of railroad three trains in which the train brakes on the prescribed per centage of cars were not connected. Each

129 string of cars—one of thirty-two, another of thirty-six, and the third of thirty-nine—was hauled as a unit, without switching in transit, from one of defendant's yards to another. The yards

at their nearest points were about two miles apart. The movement over this intervening distance was by a main-line track used constantly in the freight and passenger traffic of three great railroad systems into and out of Kansas City, Missouri—the Burlington, the Rock Island, and the Wabash. Three thousand feet of this distance was by the defendant's single-track Hannibal Bridge across the Missouri River, one of the important and most congested arteries of commerce in that part of the country. About four thousand feet including the bridge was used by the passenger trains of the three railroad systems in gaining access to the Union Station. This stretch of main-line track intersected a track of another railroad company and from twelve to fifteen tracks of a terminal company.

Defendant's contentions which the court sustains are, first, that the train-brake provisions of the appliance acts (27 Stat., 531; 29 Stat., 85; 32 Stat., 943) do not apply to switching operations; second, that the movements of the cars in question were of that character. I will not stop to consider the first of these, except to say that in some switching operations compliance with the requirement in question may be impracticable, and for that reason may not have been enforced as to them. But it is another thing to declare generally that switching operations are without the statute and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. The test of the application of the statute is in the essential nature of the conditions presented, not in the words by which they may be conveniently described. Otherwise the fate of the legislation would depend upon extraneous phraseology. It is noteworthy that the phrase "switching operations" does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. Here, that result is reached by construction. The last act, 32 Stat., 943, declares that the provisions and requirements "relating to train brakes * * * shall be held to apply to all trains * * * used on any railroad engaged in interstate commerce." No broader declaration can be conceived. No exception like that urged upon us appears and a court should be most careful in inserting one by construction. If to observe the intent of an act of Congress "any car" includes a locomotive engine (Johnson v. Southern Pacific, 196 U. S., 1) it
130 would seem that the expression "all trains used on any railroad engaged in interstate commerce" should be held to include the three trains of defendant. In view of the decisions of the courts it is too late to say the three strings of cars with their engines were not "trains" within the meaning of the law.

An argument in aid of the exemption of switching operations is deduced from the expression "on its line" in section 1 of the act of March 2, 1893. Whatever force there may have been in this disappeared when Congress provided by the act of March 2, 1903, that the requirements should be held to apply to all trains used on any railroad engaged in interstate commerce. If we keep in view the let-

ter and the spirit of the law and the evils intended to be lessened or prevented it seems to me the defense of switching operations is manifestly untenable. Among the dangers which Congress had in mind were those which arose from the movement of trains not quickly controllable by coupled power brake appliances. It also appears from the proceedings in Congress that the dangers to brakemen from the slippery tops of cars and overhead obstructions were especially regarded. The train-brake provisions would take the brakemen from the places of peril while the trains were moving.

The purpose of defendant in making up these trains at the point of origin and its intended disposition at destination are purely adventitious; and so of the absence of markers and the movement by switch engines and crews. In the passage of the trains all the dangers were present as patently as if they had been solid through trains from distant cities as to which no one would doubt the applicability of the statute. Two of the three trains in question, each composed of an engine and more than thirty cars, moved from the Murray yards north of the Missouri River to the Twelfth Street yards in Kansas City. If they had been preceded by a freight train from Chicago, separated by a passenger train from Omaha and followed by a freight train from St. Louis, all five moving on the same stretch of main-line track used in interstate commerce, only the last three, according to defendant, would have been within the train-brake provisions of the statute. Yet in each case every condition suggested by the letter and spirit of the legislation would be present: Each a train; each on a railroad engaged in interstate commerce; each moving with the same character of motive power; each at every stage of its progress menaced by similar dangers and each equally a source of danger to others; the same intersections;
131 the same overhead obstructions. Though three would be subject to the statute, it is said two would not, and the anomaly is sought to be justified by the contention that the movements of the two from yard to yard were "switching operations", employing a phrase not found in the statute. There may be reasons in practice for the exemption of some such operations, but if admitted it should be with a much narrower scope than that claimed in this case. It should not be held to cover the transfer of long strings of cars over extended distances of main-line track in the midst of through traffic. The exemption has been allowed here for reasons of inconvenience not impracticability.

Filed, November 28, 1913.

132 *Judgment.*

United States Circuit Court of Appeals, Eighth Circuit.

September term, 1913.

FRIDAY, *November 28, 1913.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, plaintiff in error,
vs.
THE UNITED STATES OF AMERICA. } No. 3892.

In error to the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed without costs to either party in this court as to the first cause of action set out in the petition.

It is further ordered and adjudged by this court that the judgment of the said District Court as to the causes of action two (2), three (3), and four (4) set out in the petition be, and the same is hereby, reversed without costs to either party in this court, and that this cause be, and the same is hereby, remanded to the said District Court with directions to grant a new trial as to said causes of action two (2), three (3), and four (4).

NOVEMBER 28, 1913.

133 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals, wherein Chicago, Burlington and Quincy Rail-

road Company is plaintiff in error and the United States of America is defendant in error, No. 3892, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the thirtieth day of January, A. D. 1914, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Western District of Missouri.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the city of St. Louis, Missouri, this eleventh day of September, A. D. 1914.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

134 In the Supreme Court of the United States.

October term, 1914.

THE UNITED STATES, PETITIONER,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD Company. No. 630.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari granted herein.

JNO. W. DAVIS, *Solicitor General.*
WARNER, DEAN, MCLEOD & LANGWORTHY,
Counsel for Respondent.

OCTOBER 28, 1914.

(Endorsed:) No. 3892. Chicago, Burlington and Quincy Railroad Company, plaintiff in error, vs. The United States of America. Stipulation as to return to writ of certiorari from Supreme Court U. S. Filed Nov. 2, 1914. John D. Jordan, clerk.

135 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Eighth Circuit, greeting:

Being informed that there is now pending before you a suit in which Chicago, Burlington and Quincy Railroad Company is plaintiff in error and the United States of America is defendant in error, No. 3892, which suit was removed into the said Circuit Court of

Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Missouri; and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
136 States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

137 *Return to writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Chicago, Burlington and Quincy Railroad Company, plaintiff in error, vs. The United States of America, No. 3892, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificates thereto.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the city of St. Louis, Missouri, this seventh day of November, A. D. 1914.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed:) File No., 24374. Supreme Court of the United States, No. 630, October term, 1914. The United States vs. Chicago, Burlington & Quincy Railroad Company. Writ of certiorari. Filed Nov. 2, 1914. John D. Jordan, clerk.

(Indorsement on cover:) File No., 24374. Supreme Court U. S. October term, 1914. Term No., 630. The United States, petitioner, vs. Chicago, Burlington & Quincy Railroad Company. Writ certiorari and return. Filed November 12, 1914.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

UNITED STATES OF AMERICA, PETITIONER,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
} No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT.

To the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above-entitled case.

This action was brought in the United States District Court for the Western District of Missouri to recover for four alleged violations of the Safety Appliance Act. Judgment in favor of the Government was rendered by said court upon the first of the four causes of action alleged in the petition, which judgment was affirmed by the Circuit Court of Appeals.

The District Court directed a verdict in favor of the Government on the other three causes of action, which judgment was reversed by the Circuit Court of Appeals. (211 Fed. 12.) It is the latter judgment which is sought to be brought here for review.

QUESTION PRESENTED.

The question involved is whether section one of the Safety Appliance Act of March 2, 1893, 27 Stat., c. 196, p. 531, as amended by the Act of March 2, 1903, 32 Stat., c. 976, p. 943, providing that a certain percentage of cars in a train shall be equipped with power brakes, is applicable to transfer trains of the character hereinafter described.

STATEMENT OF THE FACTS.

Defendant has two freight yards at Kansas City, Missouri, one, known as the Twelfth Street yard, south of the Missouri River, and the other, the Murray yard, north of that river. The yards are approximately two miles apart. Trains entering Kansas City from the west are received and broken up at the Twelfth Street yard, and cars destined for eastern points and for delivery to connecting carriers are placed upon its distributing and classifying tracks. Trains of these cars are then made up and transferred by switch engines to the Murray yard, where they are re-distributed and re-classified according to destination. For trains received and broken up at the Murray yard, the operation is simply reversed. These transfer trains are operated by their own crews,

are drawn by a switch engine, carry no caboose or markers and are run on no fixed schedule.

The trains making the transfers from one yard to the other pass for a considerable distance upon defendant's main line, which crosses the Union Depot tracks, the tracks of another railroad company, many tracks of a terminal company and the switch lines of packing houses. For a distance of three thousand feet, they pass over a railroad bridge, spanning the Missouri River, upon a single track which is used also by three other railroad companies for interstate freight and passenger traffic entering and leaving Kansas City.

The three transfer trains complained of in this case were moving cars engaged in interstate commerce, over an interstate highway, and were composed of forty-two, thirty-nine and thirty-six cars, respectively, of which only nine, nine and ten, respectively, had the power brakes in operation. If the Safety Appliance Act is applicable to such trains, none of them had the requisite number of power brakes in operation. The pertinent parts of the Safety Appliance Act and amendment of 1903 are as follows:

> * * * It shall be unlawful for any common carrier engaged in interstate commerce * * * to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without

requiring brakemen to use the common hand brake for that purpose. (Section 1; act of March 2, 1893, 27 Stat., c. 196, p. 531.)

* * * the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith; etc. (Section 1; amendment of March 2, 1903, 32 Stat., c. 976, p. 943.)

That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid * * *. (Section 2; amendment of March 2, 1903, 32 Stat., c. 976, p. 943.)

REASONS FOR THE ALLOWANCE OF THE WRIT.

I. The question presented is of great importance to the public.

II. There is a conflict in the decisions of the Circuit Courts of Appeal upon the question involved.

III. The case can not be brought to this court except by writ of certiorari.

BRIEF IN SUPPORT OF THE PETITION.

I.

Importance of the question involved.

The primary object of the Safety Appliance Act is to promote the public welfare by securing the safety of employees and travelers. *Johnson* v. *Southern Pacific Company*, 196 U. S. 1. It is just as necessary to the accomplishment of this purpose that transfer trains, when moving over the main line of the carrier, should be equipped with and have in operation a sufficient number of power brakes, as that road trains using the same track should be so equipped; indeed, more so, since transfer trains move under no schedule, but at irregular intervals as the person in control may permit. They are not only exposed to the same dangers as road trains, but are also, unless properly equipped and operated, a menace to regular interstate road trains using the track.

A correct decision of this question is of vast importance to the public, since, under modern railroad conditions, transfer trains are constantly moved be-

tween switching yards over considerable stretches of main line track, passing over bridges and grades, through tunnels, and over switches and railroad crossings. If it should be held that such movements are not within the contemplation of the act, a great number of employees operating such transfer trains will be unfairly exposed to dangers, against which like employees on road trains are protected.

It is submitted that the act does not contemplate any such distinction between employees engaged in the same kind of work. There are no words therein which would justify such construction. On the contrary, the language of the act is very broad, and, as amended in 1903, provides that it "shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce."

There are no words in the statute limiting its application to "road trains" only, and the courts have refused to give the act a narrow meaning.

> Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. (Syllabus; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1.)

The court, in the *Johnson* case (p. 18), quote with approval the following from the opinion of Mr. Justice Story in the case of *United States* v. *Winn*, 3 Sumn. 209, 211:

> "But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them."

In construing those parts of the act requiring other safety appliances, this court has held, whether the car be on the main line or switch track, that the statute imposes a positive and absolute duty upon the carrier, the non-performance of which is not excused by the exercise of reasonable diligence and due care. *Chicago, Burlington & Quincy Ry.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis and San Francisco Railroad Co.*, 220 U. S. 580.

The Circuit Court of Appeals for the Fourth Circuit, in this connection, say:

> To hold that the words "while such car was being used by such carrier upon its line of railroad" are intended to limit the statute in its application to the main line would, in a large degree, nullify the act. When we consider the statute in regard to safety appliances we are forced to the conclusion that it must have been the intention of Congress that the same should apply to side tracks and yard tracks as well as the main lines. (*United States* v. *Chesapeake & Ohio Ry. Co.*, 213 Fed. 748, 752.)

Appropriately, therefore, the argument may proceed in the following words of a learned Judge:

> Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car-coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed, in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required; the only difference being that in the one the unit is a train or combination of cars, and in the other a single car. (*United States* v. *Pere Marquette R. Co.*, 211 Fed. 220, 223.)

The Circuit Court of Appeals for the Seventh Circuit have held in a case very similar to this one that the statute was applicable to transfer trains.

The facts in that case, as found by the court, were as follows:

> Less than the required number of cars in the train had air brakes under the control of the engineer. Corwith is an outer Chicago yard, where incoming trains used in interstate traffic are stopped and the cars distributed upon various tracks. Cars that are destined to plaintiff in error's inner yard at Eighteenth street are assembled at Corwith into a train and moved about eight miles to Eighteenth street over switch tracks, leads, and main tracks of plaintiff in error, across a drawbridge and three railroads, at the rate of six to eight miles per hour. Beyond Corwith the trains are under the jurisdiction of the train dis-

patcher; between Corwith and the Eighteenth street yard, of the yardmaster. At Corwith the regular "road" crews give up the trains, and from there to Eighteenth street trains are handled by "switching" crews. From Corwith to Eighteenth street the railroad is wholly within Cook County, Ill.

Upon these facts the court held:

> * * * that such section [section one of the Safety Appliance Act] was not limited to road trains, but applied to interstate trains, destined to a particular railroad yard, which, before reaching their destination, were operated by a switching crew. (Syllabus; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 198 Fed. 637.)

The decision in the case of *United States* v. *Grand Trunk Railway Company of Canada*, 203 Fed. 775, is to the same effect.

It is submitted, therefore, that the power brake provisions of the act are applicable to transfer trains moving under the conditions present in this case.

II.

Conflict of authorities.

There is a conflict in the decisions of those Circuit Courts of Appeal which have considered this question, the Circuit Court of Appeals for the Seventh Circuit having held that the act was applicable in transfer movements of the character herein described (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 198 Fed. 637), while that of the Third

Circuit has held that the statute is not applicable in such cases (*United States* v. *Erie Railroad Co.*, 212 Fed. 853), as also has the Circuit Court of Appeals for the Eighth Circuit in the instant case (211 Fed. 12).

There being such conflict in the decisions of Courts of Appeal, it becomes necessary for this court to lay down the proper rule in such cases for the guidance of the Interstate Commerce Commission. *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292.

III.

Case reviewable only upon writ of certiorari.

Since the amount in issue is less than one thousand dollars, this case can not be brought to this court by writ of error under section 241 of the Judicial Code. Under such circumstances, although the judgment of the Circuit Court of Appeals remanding the case to the District Court for further proceedings is not final, this court undoubtedly has power to issue the writ of certiorari. *Forsyth* v. *Hammond*, 166 U. S. 506, 514–515; *St. Louis, K. C. & C. R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 251.

It is respectfully submitted, therefore, that a writ of certiorari should be issued as prayed.

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OCTOBER, 1914.

○

NUMBER 630.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

UNITED STATES OF AMERICA, PETITIONER,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT.

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BRIEF ON BEHALF OF RESPONDENT.

By way of answer to the government's petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals in this proceeding, and in opposition thereto, we desire to submit certain suggestions on behalf of respondent, setting forth the reasons why, in our judgment, there is no necessity for the issuance of this extraordinary writ. We shall not attempt to discuss in detail the merits of the question presented in the petition, but it will be necessary to state briefly some of the propositions involved in order that respondent's position relative to the issuance of the writ may be made plain.

The granting of a writ of certiorari by this court to review the judgment of a Circuit Court of Appeals under Section 240 of the Judicial Code is, of course, discretionery, but there is no rule of practice more firmly established than that the writ will be granted only when it is made to appear that the question involved is one of gravity and importance, and open to serious controversy, and in all cases it is held that this branch of the jurisdiction of the Supreme Court "should be exercised sparingly and with great caution."

Law Ow. Bew, Petitioner, 141 U. S. 583, 589.
II Foster on Federal Practice (5th Ed.), p. 1471.
United States v. *Rimer*, 220 U. S. 547.

In the latter case this court recently dismissed a writ of certiorari, which had previously been granted, because on the final hearing it appeared that the questions actually involved were not of such importance as to require the intervention of this court.

The government's petition in this case is based upon the grounds, (1) that the question involved is one of "vast public importance," and (2) that there is a conflict in the decisions of the Circuit Court of Appeals relative thereto; but we believe that a thorough understanding of the *precise* question involved will demonstrate to a certainty that the question presented is not one which is of serious concern to the public generally, and that the alleged conflict of authority is only apparent and not real, in any vital particular.

As to the Importance of the Question presented.

The questions which may be presented in this case necessarily depend upon the pleadings and the evidence.

The second, third and fourth counts of the complaint are the counts involved in this proceeding. In the second count the government charges that the respondent, on August 9th, 1910, operated on its line a certain *transfer* train consisting of 42 cars drawn by a locomoive engine, said *transfer* train being operated with power or train brakes, and being engaged in the movement of interstate commerce; that said train was so operated as aforesaid *in and about Harlem in the State of Missouri,* when only nine cars in said train had their brakes used and operated by the engineer, and when all the power-braked cars associated with said 9 cars did not have their brakes so used and operated, and when less than 75 per centum of the cars which composed said train had their brakes used and operated by the engineer of the locomotive engine drawing the train; all in violation of the Act of Congress known as the Safety Appliance Act, approved March 2d, 1893 (*27* Statutes At Large, 531), as amended by an Act approved April 1st, 1896 (*29* Statutes at Large, 85), as amended by an Act, approved March 2d, 1903 (*32* Statutes at Large, 943), and as modified by an Order of the Interstate Commerce Commission of November 15, 1905.

The third and fourth counts are substantially the same as the second, and in all of them the government asks judgment for the amount of the *penalty* provided for in the Act.

The sections of the Safety Appliance Act as amended, which are claimed to have been violated are Section 1 of the Original Act, as amended in 1896, 29 Stat. at Large, 85; 3 U. S. Comp. Stat. 1901, page 3174, and Section 2 of the Amendment of 1903, 32 Stat. at Large, 943; U. S. Comp. Stat. 1901, Supplement 1911, p. 1315.

Section 1 of the original acts, as amended, is as follows (the italics are ours):

> "Be it enacted, etc., That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use *on its line* any *locomotive* engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to *run any train* in such traffic after said date that has not sufficient number of cars in it so equipped with power or train brakes that the engineer on the *locomotive* drawing such *train* can control its speed without requiring *brakemen* to use the common hand brake for that purpose."

Section 2 of the Amendment of 1903, is as follows (italics are ours):

> "That whenever, as provided in said Act, *any train* is operated with power or train brakes, not less than fifty per centum of the cars *in such train* shall have their brakes used and operated by the engineer of the locomotive drawing such *train*; and all power-braked cars in such *train* which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to

time, after full hearing, increase the minimum percentage of cars in any *train* required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirements of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

The order of the Interstate Commerce Commission made November 15, 1905, in pursuance of the provisions of the foregoing section, is as follows (italics are ours):

> "IT IS ORDERED: That on and after August 1, 1906, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any *train* is operated with power or train brakes, not less than 75 per centum of the cars in such *train* shall have their brakes used and operated by the engineer of the *locomotive drawing such train*, and all power braked cars in every such *train* which are associated together with the said 75 per centum shall have their brakes so used and operated."

It will be observed that the foregoing provisions of the Act relate to *trains*, and not to *cars*. All *cars* are not required to be equipped with power brakes; but *trains* running in interstate commerce must have a *certain percentage* of its cars equipped with power brakes which are used and operated, etc.

See:

In re Power or Train Brakes, 11 I. C. C. Rep. 429.

United States v. *B. & O. R. R. Co.*, 176 Fed. 114.

In the case at bar, the *movements* of the *transfers of cars* complained of, were made entirely within the general terminal yards of the respondent railroad company located at and near Kansas City, Missouri; such movements consisting merely of the transferring of "strings" or "drags" of cars from one system of yard tracks to another, either as a part of the work of assembling cars to be subsequently made up into a *train* to go out on the road or as a part of the work of distributing groups of *cars* taken from a train, which had previously come in off the road and been broken up and classified into groups or transfers of cars to be moved to other yard tracks within the same terminal yards.

The question is whether the *movement* of such "transfers," "strings" or drags" of *cars* constitutes the *running* of a *train* within the meaning of the Act.

The general terminal yards of the respondent company at and near Kansas City, Missouri, are made up of three systems or sets of yard tracks, used as receiving, classifying, assembling, delivering and storage tracks. These systems of yard tracks *together with the tracks passing between and connecting them* make up the general terminal system and are all within the terminal yard limits. The system of yard tracks at the extreme south end of the general terminal yards is known as the "Twenty-fifth Street Yards," presumably because of its proximity to Twenty-fifth Street in Kansas City, Missouri. The system of yard tracks located at about the center of the terminal yards is

near Twelfth Street, and is referred to as the "Twelfth Street Yards." The system of yard tracks at the extreme northerly end of the terminal yards is referred to as Murray Yards. The Missouri River passes between the system of yard tracks known as the Twelfth Street Yards, and the northerly system of yard tracks known as Murray Yards, and the two systems of tracks are connected by a single track passing over the bridge crossing the river, and the approach thereto, which track is 3000 feet in length (Record 69, 70, 73-78).

The movements of the *transfers of cars* in question were between the latter two yards and in part along and over the single track referred to (Record 15, 16, 23, 25).

This single track, as well as all the tracks connecting the various yard tracks in and around Kansas City, were within the yard limits of the general terminal yards, and all movements over and between the various systems of yard tracks were under the supervision and control of the yard master, and no movements were under any time schedule (Record 72, 74). Certain passenger trains coming from points beyond the Missouri River at Kansas City, pass through the yard tracks known as Murray Yards, over the single track crossing the bridge and thence into the Union Depot terminal tracks (Record 56, 74). The single track connecting the yard tracks at Murray and the yard tracks at Twelfth street does not *cross* the Union Depot tracks *transversely*, as apparently indicated in government's petition, but simply passes lengthwise through the system of tracks which makes up the Union

Depot terminal tracks. As a matter of fact, these terminal tracks simply branch off of the single track in question.

All passenger trains passing through the terminal yards and over said single track of respondent lose their schedule and are controlled exclusively by yard rules and regulations (Record 75).

The single track passing over the bridge is referred to by the government as a part of the defendant's *main line*, but the facts are, as already stated, that it was within the yard limits, and was a part of the general system of terminal tracks. It was no more a part of the main line than any other track within the limits of the general terminal system over which trains coming in off the main line have to pass in order to reach the Union Depot tracks (Record 74, *et seq.*). The fact that a train coming in off the main line may have to pass over terminal tracks to reach its destination, does not make those terminal tracks a part of the main line.

It appears from the evidence that the word "train" has a fixed and definite meaning among railroad men, and that the transfers in question were not "trains" within that meaning; that *a train is "an engine, or more than one engine coupled, with or without cars, displaying markers."* All trains made up to go out on the road display markers. None of the transfers in question were made up as trains, and none of them displayed markers, and none of them were moved on any track outside of the terminal yards (Record 64, 71, 72, 80).

All transfers of cars moved from one system of yard tracks to another are in charge of *switch* crews, and the *train* crews have nothing to do with them, but have charge only of *trains* traveling out on the main line (Record 72, *et seq.*).

All of the transfers in question had a sufficient number of cars with power brakes used and operated so that the transfers were under complete control, and there is not one scintilla of evidence that travelers on passenger trains moving within the yards were endangered in the slightest by the movements of the transfers of cars between yard tracks, and the evidence shows positively that none of the members of the switching crews were ever required to operate the hand-brake to control the movements of these transfers of cars, but that they were controlled entirely from the engine (Record 55).

In the absence of any evidence of danger either to the traveling public or to the employes, but with the evidence to the contrary, the importance of the question presented, so far as the public is concerned, disappears absolutely.

The pleadings and the evidence in this case present no question as to the application of the provisions of the Act under consideration to *trains* made up to go out upon the road from station to station, and hauling interstate traffic. It is conceded that the Act applies to such *trains*. Neither do the pleadings and the evidence present any question as to the application of the provisions of the Act under consideration to ordinary switching movements

within a system of yard tracks. Manifestly the Act was not intended to and does not apply to such movements.

The real question in controversy as presented by the pleadings and evidence narrows itself down to a single class of movements, to-wit, movements of *transfers of cars* between systems of yard tracks within a general terminal yard, with which movements the public generally has no concern at all, except insofar as it may be indirectly affected by reason of the fact that, if the Act is held to apply to these movements, it will necessarily result in greater delays of traffic within terminal yards, an increase in the cost of operation, and an added complication to the railroad terminal problem, which is already one of considerable difficulty.

As heretofore stated the Act manifestly does not and cannot apply to *ordinary switching operations* in and around a single system of yard tracks. Such movements obviously do not come within the terms of the Act either in letter or spirit. No appellate court has ever so held, and the government itself has practically conceded the utter impracticability of attempting to apply the Act to movements of that character.

Although the movements involved in this proceeding undoubtedly are switching movements, their character differs from the *ordinary switching movements,* in that they consisted of a continuous movement partly over a single line of track, from one system of yard tracks to another, but they were nevertheless made entirely within the general terminal yards and altogether under yard rules

and were handled by yard employes, that is, by switchmen. The difference in the character of these movements in the respects mentioned, from *ordinary switching movements* within a single system of yard tracks, doubtless forms the basis for the government's contentions that the Act should be held to apply to these transfer movements; but a consideration of the reasons why the Act does not apply, and has never been seriously attempted to be applied, to *ordinary switching movements* within single systems of yard tracks, makes it perfectly plain that the same reasons exist to a large extent with reference to transfer movements between yard tracks in a single terminal yard, and that the Act should not be applied to them.

Briefly stated, some of the reasons why the provisions of the Act relating to the use and operation of train brakes does not apply to *ordinary switching movements*, are as follows:

1. *It appears from the Act as a whole, and the purpose and object to be accomplished thereby, that the word "train" is used in its technical sense as understood by railroad men.*

While the general rule is that in the interpretation of a statute, words will be given their usual and ordinary meaning, yet when it appears that the words in the statute *have* a technical meaning; and that such statute applies to a particular trade or profession, that the statute *directly affects that trade or profession*, and that the

members of that trade or profession will have to give the statute practical application, then the statute is construed in such a manner as to give those words their technical meaning.

It has repeatedly been held, in the interpretation of the tariff acts, that the words used in those acts, which have acquired a technical meaning in the *commercial* world will be given that meaning, because it will be presumed that Congress intended words to have the meaning which they are ordinarily given by the trade or profession which is directly affected by the statute, and which must give it practical application.

U. S. v. 112 *Casks of Sugar*, 8 Pet. 277.
Curtis v. *Martin*, 3 How. 106.
United States v. *Breed*, 1 Sumn. 159 1. c. 163.
Lewis, Sutherland on Statutory Construction, Vol. 2 (Sec. Ed.), Sec. 395 (254), page 753-754.

See also:

U. S. v. *Patterson*, 150 U. S. 68.
Arthur v. *Morrison*, 96 U. S. 108.
Lawrence v. *Allen*, 7 Howard 765.
U. S. v. *Weise*, 2 Wall. Jr. (C. C.), 72.
Elliott v. *Swartout*, 10 Peters 137.
State v. *Murlin*, 137 Mo. 306.
State v. *Railroad*, 219 Mo. 156.

In his work on Statutory Construction above referred to, Sutherland says (italics are ours):

> "Words in common use, and also having a technical sense, will, in acts intended for general operation, and not dealing specially with the subject to which such words in their technical sense apply,

be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest. *Such words, however, will be understood in a technical sense when the act treats the subject in relation to which such words are technically employed.* Thus they are deemed technically used in legislation relating to courts and legal process. Thus for example the word "party" has a technical significance. So have the words "action," "suit" and "final judgment." * * *

If a word is technical and used in a technical or conventional sense, it is to be construed accordingly, but its interpretation may then involve an inquiry into its technical meaning as a matter of fact. *Such laws are intended for practical application to men engaged in avocations in which the words have acquired a special meaning by usage.* Such statutes are to be construed according to the conventional understanding of the terms used."

It appears beyond any sort of doubt in the case at bar, that the word "train" has acquired a meaning among railroad men which is peculiar to that profession. In railroad parlance, "a train is one or more engines coupled with or without cars, displaying markers," and is made up *to go out on the road.* No railroad man understands a switch "drag" or a "transfer" or "string" of cars to be a *train* (Record, pages 73, 80, 83). It is obvious that the Safety Appliance Act must be given practical application *by railroad men,* and that the statute applies directly to *railroad men,* as a profession, and the act is *not* one which directly affects the public generally, or which has to be given application by the public. *The practical ap-*

plication of the act must be made by railroad men, and under the rules of interpretation adopted by this court, and as a matter of common sense, it must be presumed that the words used in the statute were intended to have the meaning which *railroad men* generally understand them to have.

Not only is the definition of the word "train," hereinabove referred to, one which is recognized by all railroad men, but it is the definition which is authorized, adopted and promulgated under the rules of the American Railway Association. It appears from Section 5 of the Act itself that the American Railway Association is authorized by Congress "to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars," and the certificate of that association is made final on that point. Since the entire Act is to be given practical application by railroad men alone, and not by the public generally, and since Congress has recognized the authority of the American Railway Association as an organization which is qualified to pass upon matters of this kind, there is not the slightest room for a reasonable doubt that Congress intended to use the word "train" in the sense in which it is understood by railroad men, who alone have to give the Act practical application.

Under the foregoing definition, "drags" and "cuts" of cars which are pushed and pulled back and forth within a system of yard tracks, of course, cannot be said to be *trains,* and the same must necessarily be true of *transfers*

of cars passing from one system of yard tracks to another, as in the case at bar, because they do not come within the meaning of the word "train" as used in the Act—they do not display markers, are not made up to go out on the road, and are not operated by road crews, but are merely one class of *switching movements* which is incidental to the assembling and breaking up of "trains," which do go out upon the road and are made up with markers displayed and are in charge of road crews.

2. *The language and terms of the Act as a whole demonstrate conclusively that Congress did not intend that it should be applied to switching movements.*

It is perfectly obvious from the verbiage of the statute itself that Congress never intended that the Act should apply to switching movements. The terms of the Act are not such as to evidence such an intent, but rather indicate directly the contrary as clearly as could be indicated, without a specific exception of switching movements. The Act forbids the railroad

> "to use *on its line* (not in its switch yards or terminals) any *locomotive* engine (not switch engine) in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to *run any train* (not switch any drag or transfer of cars) in such traffic after said date, that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the *locomotive* (not *switch* engine) drawing such *train* (not drag or transfer of cars) can control its speed without requiring *brakemen* (not switchmen) to use the common hand brake for that purpose."

The Act could not have been drawn so as to be more consistent with the idea that it was intended to exclude *switching movements* so far as the operation of train brakes is concerned. Among railroad men and the public generally, the railroad's *line*, is not understood to mean the *switch yards*. The word "train" as understood by railroad men, certainly does not include movements in switch yards. Railroad men and the public generally, know that *brakemen* have to do only with trains *out on the road* and not with movements in switch yards. Movements in switch yards are handled by *switchmen* only. It thus appears from the terms used in the Act itself that it was not intended to apply to movements in switch yards so far as the operation of train brakes is concerned.

This argument cannot be better expressed than in the language of Judge Buffington in the case of *United States* v. *Erie Railroad Co.*, 212 Fed. l. c. 860, where he says (italics are ours):

> "Indeed, a careful study of this act shows the use in the statute of terms and words which in common use are applied to *road*, as contrasted with *switching*, operations. The act deals first with the locomotive alone as distinguished from the train. It makes it unlawful for the railroad 'to use on its line'—and line, main line, is a word which, in the common speech of railroad work, distinguishes the *line of the road* from *switches* and *terminal yards*. But the act proceeds, 'to use on its line any locomotive engine in moving interstate traffic.' Surely the words, 'in moving interstate traffic, in connection with the use of a locomotive on its line, is aptly applied to draft of trains in their transit between

states. But the acts proceeds, the locomotive *'on its line'* which is 'moving interstate traffic' must be equipped with 'appliances for operating the train-brake system, mean that the system, the train-brake system, operated by the locomotive *'on its line'* and in 'moving interstate traffic,' refers to a *running*, rather than a *switching*, movement. And the further words of the statute, which make it unlawful for the road 'to run any such train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring *brakemen* to use the common hand brake for that purpose,' are words that aptly describe train movement. The operation of 'the *locomotive drawing such train'* is in marked contrast with the push and pull of a *switching* engine, and 'control its speed,' refers to a *train* that is speeding, for the appliances must be such that 'the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.' All these terms and words of railroad parlance are applicable to line travel and fitly descriptive thereof. In railroading, *'line'* is contrasted with *'switch,' 'yard,'* and *'terminal';* main line, branch line, with switches. A 'locomotive drawing such train' is in contrast with the push and pull of a yard switching engine."

Manifestly the logic of this argument applies alike to *ordinary switching movements* within a single system of yard tracks, and to more extended *switch movements* consisting of transfers of cars from one yard track to another.

3. *It is apparent from the general purpose, scope and object of the Act, that Congress could not have intended the provisions relative to the use and operation of train brakes to be applied to switching movements.*

The purpose of the Act, as stated in the title is "to promote the safety of employees and travelers." The safety of travelers in no way could be promoted by requiring "drags" and "cuts" of cars moved in switching yards to have a certain percentage of their cars with brakes used and operated, because travelers are not in any way affected by ordinary switching operations.

So far as the employees are concerned, the application of the provisions relating to the use and operation of train brakes to ordinary switching operations would not only not *promote* the safety of the employes, but it would render their employment many, many times more hazardous and dangerous. It is a matter of common knowledge, which must have been known to Congress, that ordinary switching movements require that single cars or groups of cars shall be constantly coupled and uncoupled, in order to classify and reclassify them, to receive them from and deliver them to connecting carriers, to deliver them to and collect them from team and storage tracks, and in order to assemble and break up trains. These movements within switch [redacted] are slow, and can absolutely be controlled without the necessity of coupling up the full percentage of air brakes required when *trains* are operated at a high rate of speed out on the road, and the safety of the employees would not be enhanced by

the coupling of the such percentage of brakes. On the other hand, if in each one of the thousands of movements made daily in large terminals, the employees were required to couple up the air brakes on practically all cars, as they would if the Act applies, and thus to pass from car to car amidst the dangerous surroundings which necessarily exist, this would multiply the dangers and hazards which they encounter many times. A little thoughtful consideration of this field of work of railroad employees indicates plainly that the purpose and the scope of the Act could in no way be accomplished by enforcing it in ordinary switching operations.

The same reasoning applies, although to a lesser extent, to *transfers of cars* moving from one system of yard tracks to another. Their movements are slow and under yard rules, and while they sometimes operate on the same track with passenger trains, which are also moved under yard rules, they are all kept under absolute control so that the application of the Act would not promote the safety of travelers. Likewise it would not promote the safety of employees, but, on the contrary, if the employees were required to couple and uncouple the air brakes of practically all cars on these transfers of cars, the danger to them would be enhanced rather than diminished. Surely, if Congress had intended that the Act should be applied to this branch of railroad traffic, it would have said so in unmistakable terms, instead of enacting a law, the terms and provisions of which, in letter and spirit, and in results to be accomplished, plainly indicate to the contrary.

4. *The enforcement of the provisions requiring the use and operation of power brakes in ordinary switching movements would lead to absurd, ridiculous and oppressive results, and it is apparent from the Act as a whole that this was not intended.*

It is apparent that if the Act should be held to apply in the case of the thousands of switching movements which are made daily in large terminals, the vast amount of additional work to be done, would make it necessary for the railroads to employ thousands of additional employees, to have many additional switch engines, to increase the size of their terminals, and to make many other changes which would be revolutionary in their character, and would cost the railroads many millions of dollars, without accomplishing any good purpose.

One of the cardinal principles in interpretation of statutes is that courts will not construe them in such a way as to lead to results which are absurd, oppressive and unjust, and beyond the scope of the purpose of a statute, when a different construction would accomplish the purpose of the Act and would avoid such unreasonable results. Conditions existing in switch yards, and which obtain in connection with such work, are altogether different from those which exist in the running of *trains* out on the *line* between terminals, and it is obvious that if Congress had intended that the Act should apply to such switching movements, this would have been made apparent from the terms thereof, instead of using terms, as heretofore indicated, which are ordinarily understood

by railroad men to apply *only* to movements of *trains* out on the road. It would seem absurd to contend that that part of the Act which is under consideration relates to *ordinary switch movements*, when there is no specific language in the Act referring thereto, when the language and terms of the Act plainly indicate that such movements are not included, and when no good purpose can be accomplished by applying the Act thereto, but on the contrary, the results of such application would be harmful to the railroad employees, and would be unjust and oppressive and cause the railroad companies to spend millions of dollars uselessly to comply therewith.

The terminal problem already is one of the many serious problems which now confront the railroads of this country. The tremendous cost of obtaining land for terminal uses in large cities, the congestion which exists, and the increased demands for quick service, add to the difficulty.

The necessity for economizing in railroad operations is becoming more and more apparent as the cost of labor, and of all materials required in railroad construction, maintenance and operations increases while freight rates do not increase, and one of the opportunities for exercising economy in operation is said to be afforded by the revising of terminal facilities.

Droege on Freight Terminals and Trains, p. 10.

The revising of freight terminals in such a way as to reduce operating expenses requires, among other things, the adoption of modern methods of switching cars.

The "push and pull" method of switching now so prevalent in many terminals is said to be neither efficient nor economical, and the author above referred to states that the poling method and the hump or summit method and gravity switching should take the place of the push and pull system whenever it is practicable or possible to do so. The poling and the hump or summit method and gravity switching are recognized as modern methods of switching which will have to be adopted in railroad freight terminals in order that the highest degree of economy may be practiced, but such methods would be out of the question if railroads were required to have all strings of cars in *ordinary switching movements* operated with power brakes. This is mentioned as one of the many absurd results which would follow if it were held that the provision requiring air brake equipment to be used and operated applied to *ordinary switching movements.*

While the same argument does not apply in all of its details to movements of *transfers of cars* between yard tracks in one general terminal, it is obvious that complicated problems which already exist in the congested terminals of great railroad centers would be greatly increased if by a strained and unnatural construction, the act was held to apply to these movements. After all, such movements are merely *switching movements* of a more extended character, made necessary by the increasing size of the terminal yards; and since the act does not and cannot apply to ordinary switching movements,

there is no logic in applying it to switching movements of a more extended character. Judge Amidon makes this clear in his opinion in this case in the Circuit Court of Appeals where he says (211 Fed. l. c. 18, italics are ours):

> "*Because of these results, as well as from the language of the statutes, we are of the opinion, that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching operations.* But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the next conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars, moved by a switch engine from one yard to another in the breaking up and making up of trains, shall be subject to the air-brake provisions of the Safety Appliance Acts, Congress ought so to provide. The whole question turns upon two points: First, do the air-brake provisions of the Safety Appliance Acts apply to switching operations? Second, was the movement of the strings of cars here involved a good faith switching operation? We are satisfied that the movement of these trains was as genuinely a switching operation as the old movement when the terminal yards were less extended than they are now. Being of that opinion, and that the air brake sections of the Safety Appliance Acts were not intended to apply to switching movements, we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff."

5. *The Government itself has practically conceded that the scope and purposes of the Safety Appliance Act are not such as to bring ordinary switching operations within the provisions relating to the use and operation of power brakes.*

The original Safety Appliance Act was adopted by an Act of Congress approved March 2d, 1893, and as amended has been in effect ever since that time. The fact that the question, whether the Act was intended to apply to *ordinary switching movements*, has not been raised or discussed until recently gives rise to the inference, which is a matter of common knowledge, that the Government has never undertaken to enforce the Act as to such movements, and only quite recently has undertaken to apply the Act to movements of transfer trains between yards within one general terminal system.

In the case of *Erie R. Co.* v. *United States*, 197 Fed. Rep. l. c. 288, in which the same question is involved, Judge Buffington, in his opinion states and says as follows:

> "It is conceded by the government that this act does not apply to, or at least has never been enforced as to switching operations. Manifestly such is the reasonable construction of the act."

The government in its brief filed in the case of *Atchison, Topeka & Santa Fe Railroad Co.* v. *U. S.*, 198 Fed. Rep. 637, said as follows (italics ours):

> "Such movements as are disclosed in the evidence as to these counts cannot properly or fairly

> be designated as yard movements. There were yard movements before the train reached corwith. There were yard movements when the cars were distributed at the 18th Street Yard. *As to such yard movements strictly so called, it might not be practical to require the coupling up of the air.*"

As already pointed out, since the Act does not apply to *ordinary switch movements*, and since the government concedes that such is the case, both by its acts and words, there is no basis for holding or contending that it should be applied to any particular class of switch movements, such as the switching of transfers of cars from one system of yard tracks to another, simply because, in the growth and development of terminals, those movements have become more extended in character. If changed conditions require added measures, the relief lies with Congress, not with the courts.

6. *There is no decision of any appellate court holding that the provisions relating to the use and operation of power brakes apply to ordinary switching operations.*

The provisions of the Safety Appliance Act include two separate and distinct matters, first, the requirements relating to the equipment, use and operation of power or train brakes on *trains*, and second, the equipment of *cars* with coupling devices, grab irons, handholds, etc.

There is no decision of this court nor of any other appellate court holding that the requirements as to the equipment, use and operation of power and train brakes applies to switching movements.

There are decisions of this court in which the Act has been held to apply to *cars* which were not equipped with proper coupling devices, or grab irons, while being moved in interstate traffic within switch yards. It appears from the terms of the Act itself, as heretofore pointed out, that a marked distinction is made and intended to be made between the requirements relating to the use and operation of air brakes on *trains,* and the equipment of *cars* with certain appliances. The act makes the *train* the unit in requiring the use and operation of power brakes, and makes the *car* the unit in requiring coupling devices, grab irons, etc., to be provided. The decisions of this court cited by the government in support of its views are cases involving defective equipment of *cars,* but not cases involving failure to have air brakes used and operated on trains, and the logic of those decisions do not apply to the latter class of cases.

In the case of *Delk* v. *St. L. & S. F. R. R. Co.,* 220 U. S. 580, the action was one to recover damages for personal injuries received while moving a *car* with defective coupling appliances, and the principal question under consideration was whether the car was still engaged in interstate commerce. The question as to the movement of a *train* without a full percentage of cars having their brakes used and operated was not discussed nor involved.

The case of *C. B. & Q.* v. *U. S.,* 220 U. S. 559, is one in which the government sought to have a penalty assessed on account of movements of certain *cars* with-

out having the coupling apparatus in proper condition. The question as to movements of a *train* without having proper percentage of cars with their brakes used and operated, was not involved and the court very pointedly limits the scope of the decision to that part of the Act which relates to automatic couples in the following language (220 U. S. l. c. 577, italics are ours):

> "In view of these facts we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act *so far as it relates to automatic couples* on trains moving in interstate commerce, and open to further discussion here."

The case of *United States* v. *Pere Marquette R. Co.*, 211 Fed. 220, is a decision by the District Court for the Western District of Michigan, and is based upon a misconception of the decisions of this court above referred to, and upon an illogical interpretation of the provisions of the act in question.

The case of *A. T. & S. F. Ry. Co.* v. *United States*, 198 Fed. 637, does not discuss the question as to the proper interpretation of the statute generally, but bases its conclusion upon the particular facts as they existed in that case, and construes the movement involved as a main line movement of a train, without giving serious consideration to the meaning of the terms of the statute, and the general scope, purpose and intent thereof, as indicated by the Act as a whole.

The foregoing decisions cannot be regarded as authoritative upon the precise question under considera-

tion, in the light of the well reasoned and well considered decisions of the Circuit Court of Appeals in this case, 211 Fed. 12, and of the Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Erie Railroad Co.*, 212 Fed. 853, and in the same case on a former appeal, 197 Fed. 287, in all of which the question at issue was squarely presented and decided.

As stated before the question involved in this case is narrowed down to the single proposition whether *transfers of cars* being switched from one system of yard tracks to another, within the same general terminal are required, under the Safety Appliance Act, to have the required percentage of cars with their power brakes coupled, used and operated.

The facts and evidence in the case do not disclose that any question of importance to the public or employees of the railroad is involved. There is no evidence that any danger is threatened or that any accident has ever happened to any traveler on the railroad by reason of the failure to have any of these transfers of cars with the full percentage of cars having their air brakes coupled and operated.

There is no evidence that any of the employes have ever been required to use the hand brakes by reason of the fact that the full percentage of air-brakes were not used and operated, but the evidence is directly the reverse, and there is no evidence of any accident or danger to any employe by reason thereof. On the contrary, the danger to the employes would be greater if in all of these

transfer movements they should be required to do the work of coupling and uncoupling the brakes on these cars amidst the dangers which necessarily exist while switch movements are being carried on.

No question of public importance is involved.

As to the Conflict of Decisions.

The Government cites the following cases decided by the United States Circuit Courts of Appeals as being in such conflict as to require the intervention of this court, by the granting of the writ applied for, to-wit:

Atchison, Topeka & Santa Fe R. R. Co. v. *U. S.*, 198 Fed. 637.
U. S. v. *Erie Railroad*, 212 Fed. 853.
C. B. & Q. R. R. Co. v. *U. S.*, 211 Fed. 12.

The latter decision is the one rendered by the Circuit Court of Appeals in the case at bar.

The case of *U. S.* v. *Erie*, 212 Fed. 853, above referred to, was before the United States Circuit Court of Appeals on a former appeal, and the same conclusion was reached as on the latter appeal.

Erie R. Co. v. *U. S.*, 197 Fed. 287.

It therefore appears that the United States Circuit Court of Appeals for the Third Circuit has twice held that the provisions of the Act relating to the use and operation of train brakes do not apply to transfers of cars being switched between yard tracks within the same general terminal, and that the United States Cir-

cuit Court of Appeals for the Eighth Circuit has held to the same effect in the case at bar, and that only one decision, which is apparently to the contrary, has been rendered, that being the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 198 Fed. 637.

The decision of the latter case is very brief, and the facts are not altogether clear, but the most that can be said as to the *apparent* conflict between that case, and the cases decided by the Third and Eighth Circuits is that the *question of fact* as to whether the movements were *switch* movements or *train* movements was decided one way in one case, and another in the others. In other words, it appears that the conflict of authority, if any, grows out of different conclusions upon questions of fact rather than different conclusions as to the law.

It does not appear in the Santa Fe case whether the movements were being made altogether within one general terminal system, nor does it appear whether the transfers were displaying markers so as to come within the definition of the word "train." In fact, most of the vital questions which must determine whether or not the Act applies to this class of traffic were not discussed in that case. Practically all that is decided by the court is that the movement was a *main line* movement of a *train* within the meaning of the act.

The decisions by the Circuit Courts of Appeals for the Third and Eighth Circuits go further and hold, after

a full consideration and discussion of the question, that the provisions requiring the use and operation of train brakes do not apply to switching movements, and that the movements in question consisting of transfers of cars was a *switching* movement and not a *main line* movement of a *train* within the meaning of the Act. That this was the scope and extent of these decisions appears from the following succinct statements contained in the opinions:

In the case at bar, Judge Amidon, says (211 Fed. l. c. 18, italics are ours):

> "Because of these results, as well as from the language of the statutes, we are of the opinion, that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching operations. But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the next conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars, moved by a switch engine from one yard to another in the breaking up and making up of trains, shall be subject to the air-brake provisions of the Safety Appliance Acts, Congress ought so to provide. The whole question turns upon two points: *First, do the air brake provisions of the Safety Appliance Acts apply to switching operations? Second, was the movement of the strings of cars here involved a good faith switching operation? We are satisfied that the movement of these trains was as genuinely a switching operation as the old movement when terminal*

> *yards were less extended than they are now.* Being of that opinion, and that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching movements, we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff."

In the case of *United States* v. *Erie Railroad Co.*, 212 Fed. l. c. 860, Judge Buffington, says (Italics ours):

> "It would seem, therefore, that none of these cases involved the question here involved, namely, the compulsory use of air-brake equipment in switching operations. On that question, which is one of statute construction, we hold the act does not compel the air coupling of cars in switching movements. We so hold, amongst others, for these reasons: *First, because had Congress meant to compel air-coupled switching, it would have said so; second, by providing automatic coupling Congress had already provided as far as it could against the avoidable dangers incident to switching; third, if the law includes switching, and Congress meant to except any switching therefrom, it neither did nor by language made it possible to now decide what switching was excepted.*"

It is possible that there may be a question of fact in various cases as to whether the movements are *bona fide* switching movements, or whether they are in fact main line movements of *trains* within the contemplation of the Act, but the various conclusions which may be reached as to these questions of fact do not necessarily indicate a variance of opinion as to questions of law. In the three cases mentioned there is no serious conflict on questions of law, and we respectfully submit that there

is not such conflict as to leave the Interstate Commerce Commission or any one else in doubt as to whether the act applies to movements of transfers of cars of the character in question. The decisions by the Courts of Appeals for the Third and Eighth Circuit make the meaning of the Act with respect to this question entirely clear, and there is nothing in the decision of the Court of Appeals for the Seventh Circuit which seriously conflicts with those decisions.

For the foregoing reasons, we respectfully submit that the Government's Petition for a Writ of *Certiorari* should be denied.

WILLIAM WARNER,
O. H. DEAN,
W. D. MCLEOD,
H. M. LANGWORTHY,
Attorneys for Respondent.

O. M. SPENCER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. } No. 630.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for argument and to hear the same with case No. 580, *The United States, plaintiff in error,* v. *Erie Railroad Company,* which has been advanced and assigned for argument on December 7, 1914, after the cases previously set for that day.

This action was brought by the United States in the District Court of the United States for the Western District of Missouri to recover penalties for four alleged violations of the Safety Appliance Act, approved March 2, 1893 (ch. 196, 27 Stat. 531), as amended March 2, 1903 (ch. 976, 32 Stat. 943), providing that a certain percentage of cars in a train

shall be equipped with power brakes. The case involves the movement of freight cars over defendant's main line between two of its freight yards at Kansas City, distant approximately 2 miles from each other.

The question is whether the power-brake provisions of the Safety Appliance Act are applicable to transfer trains moving between these two yards, and, therefore, is substantially the same as the question presented in case No. 580.

The decision of this court is not only of importance to the employees of the railroads and the traveling public, but there is also a conflict in the decisions of those circuit courts of appeal which have considered the question with reference to substantially the same conditions as obtain in this case. The Circuit Court of Appeals for the Seventh Circuit has held that the act is applicable to transfer movements of this character (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 198 Fed. 637), while that the Third Circuit, in the case with which it is desired to argue the instant case, has held that the statute is not applicable (*United States* v. *Erie Railroad Company,* 212 Fed. 853), as also has the Circuit Court of Appeals for the Eighth Circuit in the present case (211 Fed. 12).

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

○

No. 630.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUGGESTIONS IN OPPOSITION TO MOTION TO ADVANCE.

WILLIAM WARNER,
O. H. DEAN,
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Attorneys for Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUGGESTIONS IN OPPOSITION TO MOTION TO ADVANCE.

Respondent has this day been served with and received, for the first time, copy of the motion made by the United States to advance the above entitled cause for argument, and to hear the same with case No. 580, United States, Plaintiff in Error, vs. Erie Railroad Company,

whichlatter case has been advanced and assigned for argument on December 7th, 1914.

Iespondent received telegraphic notice that the motion would be made, by telegram dated October 28th, 1914,but as stated before, was not served with copy of the motion until this day (November 4th).

Vhile we do not desire to oppose the advancement of ths case and the assignment thereof for argument within a reasonable time, and upon reasonable notice, in acordance with the established rules and practices of ths court, we desire to submit the following suggestions relative to the motion of the United States, now pending.

1. While this case does undoubtedly, in part, involve the same questions of law, as those involved in case No. 580, United States vs. Erie Railroad Company, the questions of law are not *all* the same, but there are additional questions presented by the record in this case which are not presented in the record in case No. 580, and the facts out of which the questions of law arise are substantially different in each case, so that each case will have to be considered on its own merits, and they cannot and should not be considered and determined as one case. There is, therefore, no reason for advancing this case for hearing with "Case No. 580, United States vs. Erie Railroad Company," as asked by the United States.

2. Assuming that the Government's motion is determined by this court on November 9th, there will be less than thirty days between the time of the ruling upon

the motion, and the time when cause No. 580, United States vs. Erie Railroad Company, is now assigned for argument, and if respondent in this case should be required to prepare for the presentation and argument of this case on the same day, to-wit, December 7th, the time would be altogether too short to prepare for a proper and careful presentation and argument of this case in this court. The time which respondent would have would be much less than that which the defendant in error will have in case No. 580. As suggested before, each case will have to be briefed, argued, presented and considered separately and upon its own merits, and there is no reason for requiring respondent in this case to present and argue this case upon such extremely short notice.

3. The Government's Motion is based in part upon the alleged ground that the decision of this court in this case is of importance to the employes of the railroads and to the traveling public. This case was decided in the Circuit Court of Appeals for the Eighth Circuit on November 28th, 1913. (*Chicago, Burlington & Quincy Railroad Co.* v. *United States*, 211 Fed. 12), and the Government did not make its application to have this decision reviewed in this court by certiorari until October 13th, 1914,—almost a year after the decision in the Circuit Court of Appeals. After the Government had waited almost a year before applying for a writ of certiorari, and after waiting ten months before serving notice upon respondent of its intention

to apply for writ of certiorari, and after the Government has had almost a year's time within which to prepare for the presentation of this case, it is manifestly unreasonable and unjust for the Government to ask that respondent be required to prepare for the presentation thereof within less than 30 days time. If the Government could wait almost a year before applying for the writ of certiorari without jeopardizing the interests of the public or of the railroad employes, then surely these interests cannot be jeopardized by a few months additional time. This case is of much more serious importance to the respondent and railroads generally than to the public, and respondent should have at least a reasonable time for preparation.

4. As stated in respondent's brief in opposition to the granting of a writ of certiorari, this case is not one which seriously affects the general public or railroad employes, and there is no reason for advancing the case on that ground. It primarily affects the railroads, and their interests, and not the public, or the employes of the railroads. However, even if the case were one of public importance as claimed by the Government then it is not one which should be *too hastily* pressed to a determination, but the parties thereto should have opportunity to prepare for the presentation and argument thereof, in order that this court may have the benefit of a well considered and thorough preparation, which necessarily requires a reasonable amount of time.

We respectfully and earnestly urge upon this court that this cause be set down for a later date than that suggested by the United States in its motion, so that respondent may have reasonable opportunity and time within which to prepare this case for presentation and consideration by this Honorable Court.

Respectfully submitted,

WILLIAM WARNER,
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H. M. LANGWORTHY,
Attorneys for Respondent.

O. M. SPENCER,
Of Counsel.

INDEX.

CASES AND STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. } No. 630.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a civil proceeding by the United States against the Chicago, Burlington & Quincy Railroad Company to recover $300 as penalties for three alleged violations of the safety-appliance act approved March 2, 1893 (c. 196, 27 Stat., 531), as amended March 2, 1903 (c. 976, 32 Stat., 943).

Suit was brought in the United States District Court for the Western District of Missouri to recover for four alleged violations of the safety-appliance act. Judgment in favor of the Government was rendered by this court on the first of the four

causes of action alleged in the petition, which judgment was affirmed by the Circuit Court of Appeals.

The District Court directed a verdict for the Government on the other three causes of action, which judgment was reversed by the Circuit Court of Appeals and the case remanded with directions to grant a new trial. (211 Fed., 12.) It is the latter judgment which is brought here for review.

QUESTION PRESENTED.

The question involved is whether the provisions of the safety-appliance acts making it unlawful for an interstate carrier to "run any train," not equipped with and having in operation power brakes as required by the acts, "on any railroad engaged in interstate commerce" are applicable to transfer trains of the character hereinafter described.

STATEMENT OF THE FACTS.

Defendant is and was a railroad company engaged in interstate commerce. At Kansas City, Mo., it had two freight yards, one, known as the Twelfth Street yard, south of the Missouri River, and the other, the Murray yard, north of that river. The yards are 2 or 3 miles apart at their nearest points. (R. 13, 69.) Trains entering Kansas City from the West are received and broken up at the Twelfth Street yard, and cars destined for eastern points and for delivery to connecting carriers are placed upon its distributing and classifying tracks. Trains of these cars are

then made up and transferred, without further switching or stops (R. p. 72), by switching engines to points 4 or 5 miles away in the Murray yard (R. 13), where they are redistributed and reclassified according to destination. For trains received and broken up at the Murray yard the operation is simply reversed. (R. 68.) These transfer trains are operated by their own crews, are drawn by a switch engine, carry no caboose or markers, and are run on no fixed schedule. (R. 67, 68.) For a distance of about 1 mile they pass over defendant's main line, running ahead or behind express and through trains, and, for the whole distance from yard to yard, pass over tracks used by defendant's through freight trains. (R. 70, 72.) They cross the tracks of the Union Depot, those of the Frisco system, twelve or fifteen tracks of a terminal company, and the switch lines of packing houses. (R. 72, 73.) For a distance of 3,000 feet they pass over a railroad bridge, spanning the Missouri River, upon a single track, which is used for interstate freight and passenger traffic, not only by the defendant company, but by three other railroads entering and leaving Kansas City—the Rock Island, the Wabash, and the Quincy, Omaha & Kansas City. (R. 53, 54.)

The three transfer trains complained of in this case were moving cars engaged in interstate commerce over an interstate highway, and were composed of 42, 36, and 39 cars, respectively, of which only 9, 10, and 10, respectively, had the

power brakes in operation. (R. 14, 20, 22.) If the safety appliance act is applicable to such trains, none of them had the requisite number of power brakes in operation.

SPECIFICATION OF ERROR.

The Government maintains that the Circuit Court of Appeals erred in reversing the judgment of the trial court, directing a verdict in its favor, and in holding that the transfer movements in question were switching operations and not within the purview of the safety appliance acts.

ARGUMENT.

The pertinent parts of the safety appliance act and the amendment of 1903 are as follows:

> * * * It shall be unlawful for any common carrier engaged in interstate commerce * * * to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Sec. 1, act of Mar. 2, 1893; c. 196, 27 Stat., 531.)
>
> * * * the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia,

> and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith. * * * (Sec. 1, amendment of Mar. 2, 1903; c. 976, 32 Stat., 943.)
>
> That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. * * * (Sec. 2, amendment of Mar. 2, 1903, c. 976, 32 Stat., 943.)

The Interstate Commerce Commission, pursuant to section 2 of the amendment of 1903, promulgated an order increasing the percentage of cars that should have their power brakes in operation to 75 per cent of the cars in a train. (11 I. C. C. 430, 437.) It is admitted, however, that none of the transfer trains in question had even 50 per cent of the power brakes in use.

The character and movements of the transfer trains under consideration have been described. Whether the acts are applicable to such trains is the question here presented.

Defendant contends that the words "any train" used in the act do not include transfer trains, but are limited to road trains.

There are no words in the statute limiting its application to road trains only, and the courts have refused to give the act a narrow meaning.

> Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. (Syllabus, *Johnson* v. *Southern Pacific Co.*, 196 U. S., 1; *Southern Ry. Co.* v. *United States*, 222 U. S., 20; *Pennell* v. *Philadelphia & Reading Ry.*, 231 U. S., 675.)

In commenting upon the three cases cited above, Mr. Justice Pitney, in a recent case construing the safety appliance acts, says:

> In each of these cases the letter of the act was construed in the light of its spirit and purpose, as indicated by its title no less than by the enacting clauses. The same guiding principle should be adhered to in considering the question now presented. (*Southern Ry. Co.* v. *Crockett*, 234 U. S. 725, 735.)

The court, in the *Johnson* case (p. 18), quote with approval the following from the opinion of Mr. Justice Story in the case of *United States* v. *Winn* (3 Sumn. 209, 211):

> But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving

> them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.

These transfer trains certainly fall within the meaning of the word "train" as commonly understood and as defined by the courts. (*Railway Company* v. *Hackett*, 228 U. S. 559; *Dacey* v. *Old Colony Ry. Co.*, 153 Mass. 112; *United States* v. *Pere Marquette R. Co.*, 211 Fed. 220, 222.)

The Circuit Court of Appeals for the Third Circuit, in a similar case, which was brought to this court for review and recently argued here, said:

> Of course, 35 cars coupled together and drawn by a locomotive make a train, for such connected cars are drawn and follow in the engine's train. (*Erie Railroad Co.* v. *United States*, 197 Fed. 287, 291.)

In the instant case the Circuit Court of Appeals for the Eighth Circuit said:

> The word "train" of course covers any string of cars hauled by an engine. (*Chicago, Burlington & Quincy R. R. Co.* v. *United States*, 211 Fed., 12, 18.)

The letter of the statute, therefore, undoubtedly includes transfer trains of the character described. It is submitted that such trains also fall within the spirit of the act.

The primary object of the safety appliance act is to promote the public welfare by securing the safety of employees and travelers. (*Johnson* v. *Southern Pacific Company*, 196 U. S., 1.) It is just as necessary for the accomplishment of this pur-

pose that transfer trains, moving over a portion of the main line of the carrier, which, as Judge Hook says, in the dissenting opinion in this case, is " one of the important and most congested arteries of commerce in that part of the country," and traversing a score or more of passenger tracks, should be equipped with and have in operation a sufficient number of power brakes, as that road trains using the same track should be so equipped.

Under modern railroad conditions, transfer trains are constantly moving between switching yards over considerable stretches of main-line track, passing over bridges and grades, through tunnels, under overhead obstructions, and over switches and railroad crossings. If it should be held that such movements are not within the contemplation of the act, a great number of employees operating such transfer trains will be unfairly exposed to dangers against which like employees on road trains are protected, and interstate traffic, both passenger and freight, will be subjected to dangers which the act sought to remove.

It is submitted that the act does not contemplate any such result. There are no words therein which would justify such construction. On the contrary, the language of the act is very broad, and as amended in 1903 provides that it—

> shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. (C. 976, 32 Stat., 943.)

This court has held, whether the car be on the main line or switch track, that the statute imposes a positive and absolute duty upon the carrier to maintain in good condition at all times such safety appliances as automatic couplers, grab irons, drawbars, etc. (*Southern Ry. Co.* v. *Crockett,* 234 U. S., 725; *Delk* v. *St. Louis & San Francisco R. R. Co.,* 220 U. S., 580; *Chicago, Burlington & Quincy Ry.* v. *United States,* 220 U. S., 559; *St. Louis, I. M. & S. Ry.* v. *Taylor,* 210 U. S., 281.)

This court has also held, in the language used by Mr. Justice Van Devanter in the case of the *United States* v. *A., T. & S. F. Ry. Co.,* 163 Fed., 517, that:

> Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty. (*Chicago, Burlington & Quincy Ry. Co.* v. *United States,* 220 U. S., 559, 577.)

Appropriately, therefore, the argument may proceed in the following words of Judge Sessions:

> Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car-coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed,

> in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required; the only difference being that in the one the unit is a train or combination of cars, and in the other a single car. (*United States* v. *Pere Marquette R. Co.*, 211 Fed., 220, 223.)

The Circuit Court of Appeals for the Seventh Circuit have held in a case very similar to this one that the statute was applicable to transfer trains.

The facts in that case, as found by the court, were as follows:

> Less than the required number of cars in the train had air brakes under the control of the engineer. Corwith is an outer Chicago yard, where incoming trains used in interstate traffic are stopped and the cars distributed upon various tracks. Cars that are destined to plaintiff in error's inner yard at Eighteenth Street are assembled at Corwith into a train and moved about 8 miles to Eighteenth Street over switch tracks, leads, and main tracks of plaintiff in error, across a drawbridge and three railroads, at the rate of 6 to 8 miles per hour. Beyond Corwith the trains are under the jurisdiction of the train dispatcher; between Corwith and the Eighteenth Street yard, of the yardmaster. At Corwith the regular "road" crews give up the trains, and from there to Eighteenth Street trains are handled by "switching" crews. From Corwith to Eighteenth Street the railroad is wholly within Cook County, Ill.

Upon these facts the court held:

> * * * that such section (section 1 of the safety appliance act) was not limited to road trains, but applied to interstate trains, destined to a particular railroad yard, which, before reaching their destination, were operated by a switching crew. (Syllabus, *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 198 Fed., 637.)

If movements of transfer trains between yards expose their trainmen, the public, and interstate commerce, to the dangers from which Congress sought to exclude them, the length of the haul is immaterial and the air brake provision of the statute are applicable whether it be 2 or 20 miles.

The Circuit Court of Appeals for the Eighth Circuit has held that the length of the haul is immaterial where a car with a defective coupler was being hauled by a carrier. (*United States* v. *Denver & Rio Grande R. R. Co.,* 163 Fed., 519, 521.)

The Court of Appeals for the Third Circuit thus declare the purpose of the statute:

> It is to lessen the danger incident to such service, to averting collisions, to control train movements on grades, to obviate as far as possible the danger to men of working hand brakes on icy footings, and other dangers incident to road conditions, that this statute was meant to cover. (*Erie R. Co.* v. *United States,* 197 Fed., 287, 290.)

All of the dangers referred to were present in the movements of the transfer trains in question.

The purpose of the act being to guard against the dangers described, it would appear that, in pursuance of the obvious intention of Congress, transfer movements to which such dangers are incident should not be excluded from the protection of the act except by express language demanding such construction. As we have seen, none such exists.

The Court of Appeals, in the instant case, however, first read into the act an exception excluding bona fide switching movements from its operation. They then hold that the two distinct yards, located several miles apart, constitute a " terminal yard " and that any interyard movement, regardless of its nature, within such switching yard is a bona fide switching movement. From these premises they deduce the conclusion that, since the transfer trains in question moved within this switching unity, their interyard movements were bona fide switching operations and not within the statute, although there was no switching or change of make-up of these drags of cars during the transit alleged in plaintiff's declaration.

In this connection, Judge Hook, in the dissenting opinion in this case, says:

> * * * It is another thing to declare generally that switching operations are without the statute, and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. The test of the application of the statute is in the essential nature of the conditions presented, not in the

> words by which they may be conveniently described. * * * It is noteworthy that the phrase " switching operations " does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. * * * In the passage of the trains all the dangers were present as patently as if they had been solid through trains from distant cities, as to which no one would doubt the applicability of the statute. (*Chicago, B. & Q. R. Co.* v. *United States,* 211 Fed., 12, 20, 21.)

The court complain that " This case was tried mainly by the dictionary," because the Government claimed that transfer trains of the character described came within the expression " all trains * * * used on any railroad engaged in interstate commerce," yet they build up their whole argument upon mere definitions, given by them to the words " switching operations " and switching or " terminal yards," which nowhere appear in the act.

The Government agrees that " it is not a wrangle over mere names " and maintains that the question whether or not a bona fide switching movement falls within the act is not present in this case, but that the question presented is—Do the movements, by whatever name described, of said transfer trains, expose their trainmen, the public, and interstate commerce to the dangers from which Congress sought and intended to exclude them?

The court also laid great stress upon the supposed hardship entailed by construing the statute to include transfer trains.

> To this we reply that if it be the true construction, its harshness is no concern of the courts. (*St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S., 281, 295.)

However, the hardship is more apparent than real. The coupling of air brakes on transfer trains would require little time, especially if done by additional yardmen reserved for the purpose and if no tests were made. Testing of brakes would not be necessary if the railroad had theretofore performed its duty, since most of the cars constituting these transfer trains were moving in through traffic and supposedly had been previously inspected and found to be in good condition.

Furthermore, the record shows that defendant operated some of the power brakes on all of the trains in question, though not the number required by the statutes, thus recognizing the necessity of having the trains under the control of the engineer. It differed with the Interstate Commerce Commission only as to the number of cars which should be so operated during transfer movements. The determination of this question, however, was by the statute left not to the railroad but to the commission, whose decision is final.

ORDER OF INTERSTATE COMMERCE COMMISSION LEGAL.

In the court below defendant contended that the order of the Interstate Commerce Commission in-

creasing the minimum percentage of cars required to be operated with power brakes was not put in evidence and that the court could not take judicial cognizance thereof. This question was not raised in the trial court, but the case was tried upon the theory that the order was before the court, as, in fact, it was. However, the objection is not well taken, since this court has held that Federal courts may take judicial notice of rules and regulations of executive departments promulgated by authority of acts of Congress. (*Caha* v. *United States,* 152 U. S., 211, 222; *Cosmos Co.* v. *Gray Eagle Co.,* 190 U. S., 301, 309.)

Defendant also contended that it was improper for the court to presume that the order of the Interstate Commerce Commission was made after a full hearing. Under the rulings of this court, this contention is likewise without merit.

> * * * It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act. (*Knox County* v. *Ninth National Bank,* 147 U. S., 91, 97; *Nofire* v. *United States,* 164 U. S., 657, 660.)

As a matter of fact, there was a full hearing. (11 I. C. C. 430.)

Defendant further claimed, in the court below, that the act authorizing the Interstate Commerce Commission to increase the percentage of cars, required to be operated by power brakes, was an un-

constitutional delegation of legislative power, and that the order of the commission was void.

In view of the repeated rulings of this court, upholding the right to delegate administrative authority to make regulations, this contention of defendant can not be maintained. (*United States* v. *Grimaud,* 220 U. S., 506; *St. Louis, I. M. & S. Ry.* v. *Taylor,* 210 U. S., 281; *Interstate Commerce Commission* v. *Goodrich Transit Company,* 224 U. S., 194, 214, and cases therein cited; *Houston & Texas Ry.* v. *United States,* 234 U. S., 342.)

These questions, however, are immaterial, inasmuch as defendant did not comply with the statute, as unmodified by the order, none of the transfer trains in question having even 50 per cent of the cars therein operated by power brakes, as required by the act.

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals erred in their interpretation of the safety-appliance acts and in reversing the judgment of the District Court directing a verdict in favor of the Government. The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed. (*Delk* v. *St. Louis & San Francisco Railroad Co.,* 220 U. S., 580.)

E. MARVIN UNDERWOOD,
Assistant Attorney General.

DECEMBER, 1914.

○

No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

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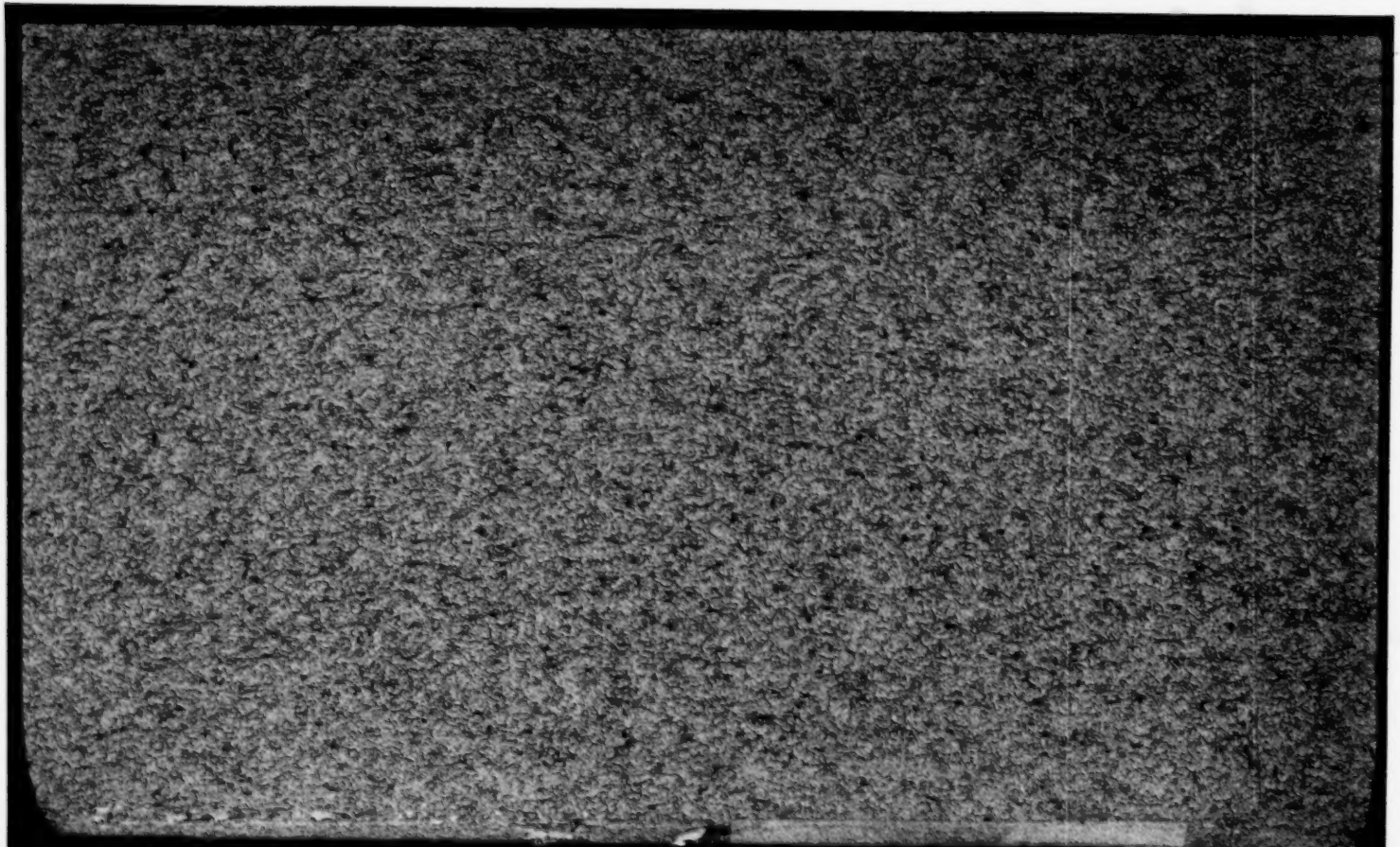

INDEX.

Citations.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE.

This action was instituted by the United States against the Chicago, Burlington & Quincy Railroad Company in the United States District Court for the Western Division of the Western District of Missouri, and was brought to recover penalties for alleged violations of the Federal Safety Appliance Act, approved March 2d, 1893 (27 Statutes at Large, 531), as amended by an Act ap-

proved April 1st, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2d, 1903 (32 Statutes at Large, 943).

There were four counts included in the complaint, the first being based upon an alleged violation of that part of the Safety Appliance Act prohibiting any common carrier engaged in interstate commerce from hauling on its line any *car* used in moving interstate traffic not equipped with couplers coupling automatically by impact, etc., and the second, third and fourth counts being based upon an alleged violation of that part of the Act prohibiting any common carrier engaged in interstate commerce from *running any train* in such traffic without the use and operation of air brakes upon a specified percentage of the cars in such *train* so that the engineer on the locomotive drawing such *train* can control its *speed* without requiring *brakemen* to use the common hand brakes for that purpose.

The trial court submitted certain issues of fact to the jury under the first count, but directed a verdict against the respondent as to the second, third and fourth counts. The jury found against the respondent upon the first count, as well as upon the second, third and fourth counts, and the trial court entered judgment accordingly. Thereafter, respondent took the case to the United States Circuit Court of Appeals for the Eighth Circuit by Writ of Error, where judgment was rendered affirming the judgment of the trial court as to the first count, but reversing the judgment as to the second, third and fourth counts.

The case is pending in this court upon writ of *certiorari* granted upon the application of the United States to review the judgment of the Circuit Court of Appeals reversing the judgment of the trial court as to the second, third and fourth counts of the complaint.

The movements alleged to have been made in violation of the Safety Appliance Act in the second, third and four counts of the complaint are as follows:

In the second count, the Government charges that the respondent on August 9th, 1910, operated on its line a certain transfer train consisting of forty-two cars drawn by a locomotive engine, said transfer train being operated with power or train brakes, and being engaged in the moving of interstate commerce; that said train was so operated as aforesaid in and about Harlem, in the State of Missouri, when only nine cars in said train had their brakes used and operated by the engineer, and when all the power-braked cars associated with said nine cars did not have their brakes so used and operated, and when less than 75 per centum of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train, all in violation of the Act of Congress known as the Safety Appliance Act approved March 2d, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1st, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2d, 1903 (32 Statutes at Large, 943), and as modified by an Order of the Inter-

state Commerce Commission of November 15th, 1905 (Record, 4).

The third and fourth counts are substantially the same as the second, excepting that in the third count it is alleged that the transfer train consisted of thirty-six cars, and that on the same date said train was operated in and about Harlem, in the State of Missouri, when only ten cars of said train had their brakes used and operated by the engineer (Record, 5); and in the fourth count it is alleged that the transfer train consisted of thirty-nine cars, and that on the same date said train was operated in and about Kansas City, in the State of Missouri, when only nine cars had their brakes used and operated. In all of said counts the Government asks judgment for the amount of the *penalty* provided for in the Act (Record, 6).

The Questions Involved.

The statement of the "question presented" in the Government's Brief is vague and indefinite. We believe that a more accurate and precise statement of the questions actually involved as shown by the pleadings and evidence, and the assignments of error (Record, 95-106) presented to the United States Circuit Court of Appeals, ~~are~~ as follows:

1. What is the meaning of the word "train" as used in the Safety Appliance Act of 1893, and the amendments thereto?

2. Do the provisions of the Safety Appliance Act prohibiting carriers engaged in interstate commerce from *running any train* in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such *train* can control its *speed* without requiring the *brakemen* to use the common hand-brake for that purpose, and the amendments thereto requiring that not less than a certain per centum of the cars in such *train* shall have their brakes used and operated by the engineer of the locomotive drawing such *train,* relate to a movement of a string or group of cars picked up a car at a time at various points within the terminal yards of a railroad, and then moved at slow speed, stopping from time to time when required by other movements in the yards, and thus passing over a single track a distance of less than a mile to another part of the same terminal yards for the purpose of distributing said cars to various *trains* that are being made up, and to various commercial houses and team tracks, it further appearing that the said strings or groups of cars are not made up as "trains" to go out on the road; that they are operated by switching crews, and not by road crews; that they are moved exclusively within the terminal yards of the company under yard rules; that notwithstanding the fact that passenger and freight trains coming in off the road and passing through the terminals pass along the said single track, such passenger and freight trains while so moving lose their schedules and are moved under yard rules at slow

speed; that said strings or groups of cars do not have cabooses or markers, as is the case with "trains" made up to go out on the road, and it appearing further that such movement from one place to another within the same terminal yards are merely extended switching movements made necessary by the increasing size of the railroad terminals.

3. Does the movement of strings of cars under the conditions last above described constitute the *running of a train* by the carrier engaged in interstate commerce *on its line,* within the meaning of the Federal Safety Appliance Act?

4. Do the air brake provisions of the Safety Appliance Act apply to extended switching operations conducted entirely within the general terminal yards of a railroad company?

STATEMENT OF THE FACTS.

The record includes the evidence relating to all of the counts of the petition. Since the judgment of the Circuit Court of Appeals upon the first count is not involved in this proceeding, a brief summary of the testimony as to the three counts of the petition involved will not be out of place.

The Government offered the testimony of only two witnesses, both inspectors of safety appliances for the Interstate Commerce Commission, George E. Starbird (Record, 12) and Elbridge L. Gibbs (Record, 32).

While all of the movements in question were in and around Kansas City, Missouri, and entirely within the State of Missouri, there is possibly sufficient evidence to show that each of the string of cars contained one or more cars loaded with interstate commerce, and it is not denied that the three strings of cars each contained the number of cars alleged, that is, 42, 36 and 39, respectively, and that only 9, 10 and 11 of the cars, respectively, had the air brakes used and operated.

The testimony of the witnesses relating to the general terminal yards at Kansas City, and the character, extent and control of the movements of cars in question, and the definition of the word "train" is as follows:

Mr. Starbird testified on behalf of the Government, upon direct examination, that the string of cars involved

in count 4 moved from the 12th Street yards in Kansas City, Missouri, past the Union Depot across the bridge to what is known as the Murry Yards of the Chicago, Burlington & Quincy Railroad Company; that the distance was between four and five miles (Record, 13) (the witness modified this statement on cross examination); that it passed upon what the witness called (by way of conclusion) the main tracks perhaps two or three miles, and went into another switching yard (Record, 14); that there were thirty-nine cars, *and they carried no caboose*, and that ten cars had the air brakes coupled and operated (Record, 14); that there were 42 cars in the string of cars referred to in the second count; that nine cars had the air brakes used and operated; that these cars were moved from the Murry Yards across the river to the 12th Street Yards; that in this movement there were cars ahead and behind the engine; that it proceeded across the single track already referred to a distance of two or three miles (Record, 20-21); that in the drag or string of cars referred to in count 3, there were 36 cars (Record, 22); that these cars were moved from Murry Yards to the 12th Street Yards, and had only 10 cars with their air brakes used and operated (Record, 22).

On cross examination, this witness testified that the string of cars involved in count 4 was made up of cars in defendant's switch yards (Record 24), and referring further to this movement the witness testified, as follows (Record, 27-28):

"Q. There is such a thing as you referred to in your testimony awhile ago, and as counsel for the Government several times referred to—a drag—what do you railroad men mean, in railroad parlance, when they say a 'drag of cars'?

A. A number of cars attached to a road or switch engine, hauled by a road engine, temporarily used in yard service, or one or more cars attached to that engine, leaving a terminal yard of the company, going in any general direction whatsoever, and cars attached to that engine destined to a yard of the same company or a connecting line, or along the main line of the company, doing industrial work, where cars in that drag separately would be sent out.

Q. Is that what they were engaged in doing?

A. No, sir; they did not set out nothing—it was a transfer train or *drag, as usually termed*, a continuous movement from the Twelfth Street yard over to the Murry yard, which is known as the train yard, and trains are made up.

Q. Have you acquired sufficient knowledge to be able to tell whether, in the operation of these drags, they are used—that is the term used when engaged in the process of switching, isn't it?

A. No, sir.

Q. It would make no difference whether switching or not?

A. No, sir; you have got to make it up into a transfer train or drag before it constitutes a train.

Q. Was this a drag?

A. It was a train made up to leave the Twelfth Street yard, destined to the Murry yard.

Q. As counsel for the Government referred to drag several times, I want to know whether you say it was a drag?

A. I call it a transfer train.

Q. Was it a drag?

A. They drug it.

Q. You used the word 'drag;' I want to know now whether you say, as an expert, it was a drag?

A. Both ways, a transfer, drag, or cut of cars.

Q. These cars I have been talking about, you tell the jury it was, in railroad parlance, known as a drag, a transfer, or a cut of cars?

A. Yes, sir; various appellations used.

Q. And you know, don't you, that the drag or transfer or cut of cars, and all those drags, transfers, or cuts of cars to which you have been testifying were being taken, if they were taken across the river, north, were taken over there for the purpose of being put into trains to be sent out over the road?

A. Yes, sir.

Q. And you know that any one of the transfers, drags or cuts of cars to which you have been testifying, which came from the north side to the south side, was being brought over, had been picked up from the yard on the north side of the river, where the trains had come in, and down there, from the different trains, and brought to the south side for the purpose of distribution to other roads or to the merchants?

A. Yes.

Q. That is what the railroad company was engaged in doing with these drags or transfers the day you have been testifying about?

A. Yes, sir.

Q. And they were all in charge, at least two of them, in charge of the same man Deere?

A. Yes, sir.

Q. And he is called the foreman of a switching crew?

* * * * * *

A. Yes, sir; foreman.

Q. He was in charge of the switching crew?

A. Yes, sir; transfer switching crew.
Q. Transfer switching crew, all right. You knew that all that time, didn't you?
A. Yes, sir."

This witness further testified on cross examination (Record, 29):

"Q. * * * *You know, and knew then, that there was neither one of those drags or cuts of cars, or transfers, that you have been referring to, as made up at the time you saw it, was not intended to go out over any railroad, except as being moved from one side of the river to the other, between what we call the switch yard, by the switch crews.*
A. *That is what I have been testifying to and so stated.*
Q. *All right. And you knew that any movement of that kind, of these drags, that was going from the south side of the river to the north side of the river, was to take them over to the Murry yard, there to be shifted about, from track to track, and switch to switch, to make up trains going different directions, and put them into the trains to which they might belong?*
A. *Yes, sir.*"

This witness testified further on cross examination, that he was not certain about the distance between the 12th Street Yard and the Murry Yard, and that he had no knowledge as to the length of the single track across the bridge and connecting the two yards; that the single track across the bridge was necessarily used by the railroad company in moving the drags of cars about which he had been testifying, in order to get from one yard

to the other, and that there was no other way for the railroad company to use or handle these drags, in the switching of them by the switching crews when they make them up intó trains or distribute them to the different railroad companies (Record, 29-30); that he did not know what the yard limits were (Record, 30).

The witness, Gibbs, the other Government inspector, testified that the distance from the 12th Street Yards to the Murry Yards was a couple of miles; that the single track crossing the bridge was what he "judged" to be a main line track, and was used by passenger and freight trains (Record, 33); that the strings of cars in question were drawn as a unit from one yard to another, but were delayed for awhile on the bridge (Record, 34).

Upon cross examination, the witness testified that "transfer drags" was the term used among railroad men to designate the strings of cars in question; that said strings of cars were not made up to go out on the road, but were going from one yard to another (Record, 34); and further that (Record, 34-35):

> "Q. And they were either assembled from different switch tracks on the south side of the river or assembled from different switch tracks on the north side of the river, to be taken to those switch yards either from the north or south side?
> A. From experience, I know that is the method commonly used.
> Q. You speak as a railroad man?
> A. Yes, sir.
> Q. And you understand that where either of these drags was made up, in the north yard, across the

river, that it was simply the assembling or getting together of cars which had come off the main lines in trains to pick them up and bring them over to the south side of the river for distribution into the switch yard down here, to the different roads?

A. That is what occurred.

Q. Or set for the merchants, set for unloading?

A. Yes, sir; set.

Q. And, on the other hand, if a drag was made up on the south side of the river, the cars were picked up from the different switch yards in the same way and taken to the north side of the river into the switch yard, and there distributed into the trains for which they might be intended?

A. I would say that would be the method in which they would be handled."

The foregoing is in substance all of the testimony introduced by the Government relating to the three counts now before this court.

The testimony on behalf of the defendants as to these three counts is substantially as follows:

John Deere testified (Record, 49), that he was a switch foreman, and had charge of the different drags of cars that were being switched back and forth across the river referred to by the Government; that as switch foreman his duties were such as breaking up trains and trensfers and shifting them from one track to another, and making up trains in the switch yards, or dismembering trains in switch yards (Record, 49).

On cross examination, this witness testified that the switching crew would sometimes take the waybills over to Murry Yards where the trains were made up

to go out on the road (Record, 52), and further (Record, 52):

> "Q. And if there is no large number of these cars fitted up, having their air brakes used and operated, if it becomes necessary to stop those cars quickly, it is necessary for the switching crew to go to the top of the cars and operate the hand brakes, isn't it?
> A. *No, sir.*"

That in the course of his duties as switch foreman he sometimes took these switch drags or strings of cars from what is known as the 12th Street Yards to the Murry Yards; that the distance between the two yards was about a mile and a half or three-quarters; that the "bridge and all" were within the yard limits (Record, 52); that the track across the bridge is a single track about 3,000 feet long, and is also used by trains of other railroads (Record, 53).

On re-direct examination this witness testified that the term "switch drag" is a term known among railroad men, and generally applied to the strings of cars referred to in the testimony; that they were called switch drags or Murry drags, or cuts or transfers of cars (Record, 54).

F. C. Rice, general inspector of transportation for the Burlington system, testified (Record, 59) that he has been connected with that railroad 49 years; that he is connected with the American Railway Association, which is an association composed of every interstate railroad in the United States, of which there were 447;

that he has been connected with said association about 20 years as a representative of the Burlington; that the representatives of the various railroads constitute the association (Record, 59); that the witness commenced with the Burlington Railroad in 1863 as a telegraph operator and clerk, and thereafter became an agent, train dispatcher, division operator, chief train dispatcher, train master, division superintendent of the Illinois lines, and finally general superintendent (Record, 60); and further (Record, 60-61):

> "Q. Now, from your knowledge of the railroad business, and especially the transportation part of the railroad business, do you know whether or not the word 'train' as used in the railroad business has any fixed, definite and technical meaning among railroad men, and in the railroad business, and especially the transportation business?
> A. It has.
> * * * * * *
> Q. You say that the word 'train' in railroad parlance, has a fixed, definite and technical meaning?
> A. Yes, it has.
> Q. What is the meaning of the word 'train' in railroad parlance, as applied to the railroad business?
> A. A train is an engine, or more than one engine, coupled together with or without cars displaying markers.
> Q. For how many years has that been the technical meaning of the word 'train' in the railroad business, so far as you know?
> A. It has been over fifteen years. I am not sure but it is twenty, I think twenty years.
> Q. At least twenty years?
> A. Yes, the established definition.

Q. Is that a definition given to that word by the American Railway Association?
A. It is.
Q. And that has been a definite meaning given to it by the American Railway Association for at least twenty years?
A. Yes, sir.

Mr. Timmonds: If Your Honor please, I don't know whether you are aware of it, but I call your attention now to the fact that in the safety appliance act Congress recognizes the validity and existence of the American Railway Association, and clothes it with certain powers; names it specially in the act, in the safety-appliance act."

The witness testified further, as follows (Record 62-63-64):

"Q. Will you tell the jury what the word 'markers' in the defining of a railroad train means, if you know?
A. It is a special signal placed at the rear end of the train to indicate that the train is intact, that it is complete—color signals by night and flags by day, colored flag by day.
Q. Those markers are at the front and rear end of the trains, too?
A. No, sir; a marker is only at the rear end.
Q. What do those markers indicate and mean?
A. They mean the train is full and complete; that is, the end of the train.
Q. When a train is full and complete, as you have said; is it then in condition to be moved out on the lines of the railroads—it may go on the roads, then; run to its destinations?
A. There are certain things required at the head end of the train.
Q. What is that?

A. A head light on the engine, and if it is an extra train—there are only two classes of trains; one is a regular train, which is a train that is on the time table and has a schedule; that is one class; and the only other class is an extra train, and an extra train and a regular train both carry markers, but an extra train carries two distinct signals on the front end of the train to designate it is an extra, which a regular train does not carry.

Q. The markers are on an extra, as distinguished from a regular train?

A. No, not at all. The marked of an extra and a regular passenger or freight is the same. A regular train carries nothing in front but a head light, unless run as a section, and an extra train is obliged to carry two white lights by night and two white flags by day to show it is an extra as distinguished from a regular; so, to be complete as a train, it must have those signals.

Q. Strings and drags that move around in the switch yards in charge of the switch crews, with switch engine, do not have any of those things on them?

* * * * * *

A. At night the switch engine would have a head light.

Q. And the markers referred to?

A. The switch engine, under our rules, does not carry markers. They are prohibited from carrying markers. The switch engine is prohibited from carrying markers.

Q. Under the rules of the American Railway Association?

A. Yes, sir.

Q. These rules have been in force for at least twenty years?

A. Twenty-nine years.

Q. Has that definition of the word 'train' always

been in force by the American Railway Association for twenty-nine years or longer?
A. I don't think that definition of a train—the definition of a train was made while I was a member of the train-rules committee of the American Railway Association.
Q. Twenty years ago?
A. During that time. I don't remember just when we made that, but it was eighteen or twenty years ago.
Q. *Now, then, I will ask you whether or not trains, within the meaning of railroad parlance, perform different functions from these switch drags—do they run out on the road and make long runs from point to point—switch drags do not do that?*
A. No, sir.
Q. What are switch drags for; what function or duty or work do they do in the railroad business?
A. In the yards, in the yards proper, where we have storing tracks and have classification tracks, the switch engines sort the cars.
Q. Sort them?
A. Sort and put the cars of a kind together; that is switching; and when necessary, after the classification of cars has been made, to go to some other yard or to some other point, we call it a transfer.
Q. A transfer?
A. A transfer; that is the general name that is used—transfer or string.
Q. Transfer or string?
A. Yes.
Q. Then it is the work of this transfer or drag—switch drag, as you call it—it is either to assemble or take and get together cars coming in from different trains or get them together and take them where they can be put into their trains?
A. Supposing you have trains come into our yard across the river, and they may have cars for a

dozen different destinations—might have four or five trains that might come in and have cars for elevators, if you have elevators, and the switch engine would separate them.

Q. Trains come in, and they stop in the yards at Murry?

A. Yes.

Q. *And they are broke up?*

A. *They cease; the train ceases in the Murry yard.*

Q. *Ceases to be a train?*

A. *Ceases to be a train.*"

Joe McDonald, assistant superintendent of the defendant railway company at Kansas City, testified (Record 64) that he had been in the railroad business thirty years, beginning as a yard clerk, and thereafter becoming a switchman, assistant yardmaster, conductor, yardmaster, assistant yardmaster, general yardmaster, trainmaster and superintendent; that the length of the single track across the bridge and connecting the 12th Street Yard and Murry Yard is 3,000 feet (Record, 65), and further (Record, 65-66):

"Q. Is there any other way whereby the two ends of these switch yards may be used, except by getting across the river on that track?

A. There is not.

Q. Now, do you know where the switch yard limits are?

A. Yes, sir.

Q. Tell the jury.

A. *The north yard limit is at the switches, just north of the switches, and at the extreme north end of what is known as the Murry Yard, the south limits of them is about Twenty-seventh and State Line Streets.*

Q. *On the south side of the river?*
A. *Yes, sir; south of Twelfth Street.*
Q. *Are these two ends now, and have they all along been, used together as constituting one switch yard in the management of the railroad business of the Chicago, Burlington & Quincy Railroad?*
A. Yes, it is all one yard.
Q. How long has it been so?
A. It has been so ever since it has been a yard, ever since the yard was completed.
Q. How long has that been?
A. The Murry Yard was added onto it, I think, about seven or eight years ago—about ten years ago, possibly, I don't remember the exact date.
Q. *During all that ten years the two ends of it, and with the bridge between them, over the Missouri River, and between them, have been used as constituting one switch yard, in the management and handling of the railroad company's business here at Kansas City?*
A. Yes, sir.
Q. And then this one track that crosses the bridge, that is the track referred to by the Government witnesses was it, the one you are referring to as being 3,000 feet long—that is the track they have been referring to?
A. I should judge so; yes, sir.
Q. *And that* 1,000 *foot track which crosses the bridge is the only track, and is all within the switch limits?*
A. *Yes, all in the yard limits, sure."*

With reference to the meaning of the word "train" as understood by railroad men, the witness testified as follows (Record, 66-67-68-69):

"Q. Do you know, from your experience as a railroad man, whether the word 'train' has any

fixed, definite and technical meaning, as applied to the railroad business?

A. Yes, sir.

Q. In railroad parlance, what is the meaning or definition of the word 'train'?

* * * * * *

A. A train is one or more engines coupled together, with or without cars, with markers, markers displayed.

Q. A train, then, being, as you define it, is a complete connection of cars, with a road engine and train crew for use in running on the railroad from destination to destination?

* * * * * *

Q. It is then in condition to be run on the road, in the railroad business?

* * * * * *

A. *Yes, it is a train after the engine is on and way car put on, and the markers are displayed, and furnished with a train crew.*

Q. And it is not a train until then?

A. No, sir.

Q. *Now, you heard about these strings or drags of cars referred to, which are being hauled back and forth across the bridge here from one end of the yard to the other in the making up of trains and breaking up of trains—what, in railroad parlance, is the name of that string of cars?*

A. *A string of cars going from the Twelfth Street yard to the Murry yard would be called a drag, for the reason they would go over there to be part of them sent out on trains and part of them to the elevators or the other industries or store tracks to be held; what we know as a drag of cars, a string of cars going from the yard in Kansas City, going to the Santa Fe, the Missouri Pacific, or the C. & A. would be known as a transfer, a delivery to the connecting line, a transfer to be delivered.*

Q. Do they carry markers?
A. Oh, no.
Q. Do they ever carry markers in the railroad business, what you call markers on a train; drags do not carry markers?
A. No; only on trains, but not on transfers or drags.
Q. Are they ever entered upon the time tables, scheduled like trains are?
A. No, sir.
Q. *Can you, in some general way, without taking up too much time, explain to the jury how drags, transfers, are handled in the switch yards? Take a drag going from the south side of the river to the north side, and tell how the drag is made up and handled.*
A. *We receive from some ten or twelve different roads at Kansas City cars from different places, from the east, north and northwest, and those cars will be assembled and go into a drag, taken over to Murry's—it might be elevator loads, or loads for the construction company, any of those people over there; they go over in one drag, over to Murry's, and are sorted over there in the classification yard.*
Q. To be put into trains, if the trains go?
A. If they are train cars. Possibly there might be a few train cars and a few for other places. They are taken over there and classified and put in different places, but eventually delivered or sent out in trains, whichever the case might be, where the car goes.
Q. That is in charge of what is known as the switch crew with a switch engine?
A. Yes, sir.
Q. And the foreman?
A. *That never gets out on what is called the main line; it is always within the yard limits.*

Q. When they come the other way, from the north side of the river to the south side of the river, you say they are called transfers, properly?
A. Yes, sir.
Q. Explain to the jury the movements in that case, how made up, what for?
A. The trains that come from the north and west and from the east, if they pull in the Murry yard, they stop there, and the switching crews would take charge of them.
Q. Do they cease to be trains when they come in the Murry yard?
A. Yes, sir.
Q. And turned over to the switching crew?
A. Yes, sir.
Q. What does the switching crew do with them?
A. Classifies the stuff---switches it up to the different connecting lines it goes to.
Q. Break up the trains and take the cars out and classify them?
A. Yes, sir.
Q. What do they do with them?
A. They deliver them; all the cars that go to the Santa Fe to one track, and the cars of the Missouri Pacific to another, and the Union Pacific another, and so on, and then they are doubled up into transfers, and one engine, taking probably thirty or thirty-five cars, goes to Kansas City to deliver them to the different connections.
Q. Distributes them over here?

The Court: Were these drags or transfers, whatever you call them, in controversy here of the kind and description you are now describing?

The Witness: Yes.

Q. These drags or transfers in controversy, they did not display any markers?
A. Oh, no.
Q. Do they ever display markers—any cars used in that manner?

A. We do not furnish the markers to the switch crews at all.
Q. And they never have any?
A. No, sir.
Q. And never display any?
A. No, sir.
Q. And they are never entered upon the schedules, the railroad schedules?
A. No; no schedule.
Q. They could not be handled in that manner?
A. I would not like to try to handle them in that manner.
Q. They never are?
A. No, sir.
Q. By any railroad?
A. No; not that I know of around here."

On cross examination, this witness testified that what is known as the 12th Street Yard is a part of he company's yards; that there is some classifying done there, but more is done at what is known as the 25th Street Yards at the south end of the Burlington Yards; that the distance between the 12th Street Yard and Murry Yards is two miles (Record, 69); that to go from the 12th Street Yard to the Murry Yard, the trains had to pass over the single track which is used by passenger and freight trains of other roads, but the witness did not consider this "main line" (Record, 70); and further (Record, 70-71):

"Q. Now, these trains that were made up in one yard to go to another—whether you call them trains or drags or transfers---they are not run on regular time-tables?
A. No, sir.

Q. They have no proper schedule time?
A. No, sir.
Q. They are made up, as the case may be, and take their chance on getting by, do they?
A. Yes, sir.
Q. They have to keep out of the way of express and through trains, don't they?
A. They run right along ahead of them, or behind them.
Q. They are operated under some kind of orders, are they not?
A. Operated under a block system.
Q. And they proceed when it is supposed that an express train is not coming?
A. They proceed whenever they get the block.
Q. And those blocks are governed by signals that come from the dispatcher's office?
A. *No; there is no train dispatcher there.*
Q. By orders that come from where?
A. *From the towermen that work the switches.*
Q. *Where do the towermen get orders as to when trains are coming?*
A. *From one another. They let one train follow another right along.*
Q. *And the express trains lose their time schedule, do they, when they arrive within the limits there, and have to wait upon the convenience of any of these other trains hat happen to be let into the block by the towermen?*
A. *Yes, sir; you bet that is true; they have to wait."*

The witness further testified, on cross examination, as follows (Record, 72):

"Q. After the switching is done and a drag of cars is made up at one of these yards, it then is run as a unit over the main line to the other yard, where it is then separated: that is the truth, isn't it?

A. It is run as a unit through the yard to the delivering point.
Q. Over these two miles of track?
A. Yes, sir.
Q. Single track?
A. Yard track; yes, sir.
Q. If that two miles of track is not main track, then there is not any main track, is there?
A. Oh, yes; lots of it.
Q. Between Murry Yard and the Twelfth Street Yard?
A. No; there is no main track.
Q. There is no main track?
A. No.
Q. And you say that the tracks used by all those railroads for passenger trains and freight trains are not main line?
A. No, sir; yard track; governed under yard rules; moved about over there under yard rules."

The witness further stated on cross examination that the tracks between the 12th Street and Murry Yards passed through the Union depot tracks and across the tracks of other railroads (Record, 72-73); that the first freight yard after leaving the 12th Street Yard is the Murry Yard where there are 17 or 18 tracks in the classification yard, six in the reception yard, six or seven in the departure yard, and eight or nine in the grain yard and four or five in the repair yard; that the Murry Yard is about a mile and a half or two miles long, and about a quarter of a mile wide; that the 12th Street Yard runs from 12th Sreet to 29th Street, a distance of about fourteen or fifteen blocks, and is about two hundred feet wide (Record, 73); that there are 16 or 17

tracks in the 12th Street Yard; that the tracks are open at both ends; that there are also "hold" tracks there; that some classification is done there as well as in the Murry Yards (Record, 74); that the distance between the 12th Street Yards and the bridge across the Missouri River is about twelve blocks (Record, 74).

F. H. Ustick testified (Record, 75) on behalf of defendant that he had been in the railroad business thirty-three years, and was general superintendent of the Burlington's Missouri lines, and with reference to the meaning of the word "train" testified, as follows (Record, 75-76):

> "Q. I wish you would state to the jury whether or not the word 'train' has, and has had for the last twenty years or more, in the railroad business, and amongst railroad men handling railroad business, any fixed, definite, and technical meaning as applied to that business.
> A. Yes, sir.
> Q. Tell the jury what that meaning is.
> A. One or more engines coupled together, with or without cars, displaying markers, constitutes a train.
> Q. And that is the meaning, in railroad parlance, of the word 'train,' and has been all these twenty years or more?
> A. Yes, sir.
> Q. What is a drag, or transfer, in railroad parlance, if there is any such word?
> A. A drag is considered a yard movement of cars, being shifted from one yard to the other, through the leads, and a transfer is a delivery that ---a string of cars rather that is being delivered to connecting lines.

Q. Those movements of cars are all in switching of the cars?

* * * * * *

A. Yes, sir.

Q. You have been present today and heard the description of these strings of cars that cross the bridge here across the Missouri River between the north and south ends of the switch yards of the Burlington Railroad Company?

A. Yes, sir.

Q. In what respect, if any, do they differ from a train in railroad parlance?

A. They are all different, because yard movements of cars are handled by men who shove the cars, and who are known as yardmen or switchmen, who do not have to pass an examination for train service, while the train on the road, the conductors and enginemen are required to pass an examination on all rules and time tables before they are permitted to take charge of train work.

Q. You gave the definition of a train; in what respect do these strings of cars we have been talking about here today differ from a train in railroad parlance?

* * * * * *

A. In what respect do they differ?

Q. Yes; either in function or make-up.

A. The yard train is a train that is being broke up, switched, or delivered to connections, while a train is a movement of them from one terminal to another.

Q. Do these drags or transfers ever display markers in the railroad business?

A. No, sir.

Q. Do they have places on the schedules of the railroads?

A. No, sir.

Q. Trains are always scheduled, are they?

A. Yes, sir."

The witness, Joe McDonald, upon being recalled, testified further that the drags or strings of cars in question did not get their signals from the train dispatcher; that the train dispatcher handles the trains over the main line, from one terminal to another; that the trains from one terminal to another are run on a schedule, except in the case of an extra when they would get their orders from the train dispatcher; that the switching crew in operating the drags would not get any instructions from the train dispatcher, but that their movements over the bridge are controlled by what is known as a towerman, who has charge of the interlocking levers of the switches, and that the signals are given by the towerman to the switch foreman when the track is clear so that they can pass from one yard track to another (Record, *77*).

Summary of Evidence.

The foregoing evidence of all of the witnesses, and the natural and logical conclusions to be deduced therefrom may be summarized as follows:

Respondent's Kansas City Terminal Yards:

The general terminal yards of the respondent company at and near Kansas City, Missouri, are made up of groups of yard tracks, used as receiving, classifying, assembling, delivering and storage tracks. These groups of yards tracks *together with the tracks passing*

between and connecting them make up the general terminal yards and are all within the terminal yard limits. The group or system of yard tracks at the extreme south end of the general terminal yards is known as the "Twenty-fifth Street Yards," presumably because of its proximity to Twenty-fifth Street in Kansas City, Missouri. The group or system of yard tracks located at about the center of the terminal yards is near Twelfth Street, and is referred to as the "Twelfth Street Yards." The group or system of yard tracks at the extreme northerly end of the terminal yards is referred to as Murry Yards. The Missouri River passes between the group of yard tracks known as the Twelfth Street Yards, and the northerly group or system of yard tracks known as Murry Yards, and the two groups of tracks are connected by a single track passing over the bridge crossing the river, and the approach thereto, which track is 3000 feet in length.

Prior to the addition of what is known as Murry Yards, about ten years ago, the Burlington's terminals at Kansas City consisted of yard tracks extending from the Missouri River to about Twenty-fifth Street, and from Twelfth street south to Twenty-fifth Street, there were systems or groups of yard tracks used for assembling and breaking up trains, for the classification of cars, for team tracks and for the distribution of cars to various industries. It is reasonable to infer from the evidence that that part of the terminals known as Murry Yards was added because of

the necessity for an increased number of yard tracks; that in order to enlarge the terminals it became necessary to acquire land north of the Missouri River, and that thereafter the terminals included the tracks on the north side of the river and the single track passing across the bridge and connecting the groups of yard tracks on the north and south side of the river. The various yard tracks grouped together at and near 12th Street, and at and near 25th Street, and in Murry Yards were and are all operated as a single terminal yard, and were and are all within the yard limits of the railroad company, and were all in charge of the yardmaster. Freight trains coming in off the line from points north, northwest and east of Kansas City have their terminus in Murry yards, and all trains coming into any part of these terminals, lose their schedule upon arriving in the yards, and are thereafter moved under yard rules. All movements of cars between the various systems or groups of yard tracks, in the course of switching operations that are necessarily carried on in the making up and breaking up of trains and in the distributing of cars are in charge of a switch foreman and switching crews, and are not in charge of trainmen or train crews.

It appears from the testimony that the single track across the bridge was used by passenger and freight trains of other roads, and the Government's witnesses referred to this track as "main line" but this was the mere statement of their conclusion, and it appears beyond question that this single track was all within the yard

limits, and formed a part of the terminals; that it was no more a part of the main line than any track that is used by trains coming in off the main line and passing through yard terminals. The fact that trains of other railroads passed over the Bridge across the Missouri River does not make the single track on the bridge a part of the main line. The court will perhaps take judicial knowledge of the fact that by reason of the topography of the country it is exceedingly difficult for railroads to gain access to the city from the north, and for that reason the trains of a number of railroads are permitted to pass through the Burlington's Terminal Yards, in order to reach the Union Depot, but in so passing through said terminals they become subject to yard rules, and are no longer subject to schedule as is the case when they are out on the main line.

The Character of the Movements Involved.

In the course of the breaking up and making up of trains and the distribution of cars to industries, it was necessary from time to time to move a group or string of cars from one group of tracks to another, and these movements were always in charge of switching crews, and were made exclusively under yard rules and regulations. None of such transfers or movements of strings of cars were made under any schedule, but they were moved from time to time as occasion demanded and other yard movements permitted, and were moved at slow speed, one right after the other as close as

they could be moved, starting and stopping irregularly whenever other movements in the yards required it; that such movements were not made at a rapid or high rate of speed as trains are moved out on the road; that in making such transfers the switching crew did not have to operate or use hand brakes, and that such trains were not made up with markers or caboose as is the case with trains made up to go out on the road.

All of the movements in question involved in this proceeding were switching movements which were being made for the purpose of distributing cars to various trains which were being made up, to various industries and to various other railroads.

No evidence was adduced on the part of the Government to show that any of the switching crews operating these transfers of cars, or any other employes were subjected to any danger or risk by reason of the conditions surrounding the making of the movements in question, and neither is there any evidence that any passenger or passenger train were subjected to any danger, or that any accident had ever occurred by reason thereof. The evidence shows clearly and conclusively that the conditions under which these transfers of cars were moved were and are entirely different from those under which *trains* are operated out on the road where they attain a high rate of speed, which must be reduced and increased rapidly in order to transport commerce expeditiously and accomplish the schedule under which they are operated.

None of the movements referred to in evidence come within the definition and meaning of the word "train" as understood, adopted and applied by railroad men in the railroad business.

Distinctions between regular trains and transfers or drags of cars:

The differences between regular trains moving out on the road and transfers or "strings" or "drags" of cars moving between groups of tracks within a terminal yard, as shown by the evidence, are numerous. Some of the differences are, as follows:

1. Transfers of cars moving between groups of yard tracks in a terminal yard carry no caboose or markers, while regular or road trains carry both a caboose and markers.

2. Transfers of cars moving between groups of yard tracks in a terminal yard are operated by switchmen while road trains are operated by road crews, that is, a conductor, brakeman, engineer, fireman, etc.

3. Transfers of cars moving between groups of yard tracks in a terminal yard are not operated under schedule, but are moved whenever they are assembled, and other yard movements will permit, whereas road trains are operated under schedules.

4. Transfers of cars moving between groups of yard tracks in a terminal yard are operated entirely within the yard limits, and do not go out on the main line, whereas road trains are operated from terminal to terminal over the main line.

5. Transfers of cars moving between groups of yard tracks in a terminal are operated at slow speed under control, starting and stopping whenever conditions in the switch yards demand, whereas road trains are operated at a high rate of speed, stopping only at scheduled stations and crossings.

6. The movement of transfers of cars between groups of yard tracks in a terminal is merely one form of switching, and is merely incidental to the main business of the carrier in carrying commerce from station to station, whereas road trains are engaged in performing the chief function of the carrier—the transportation of commerce from station to station, and from state to state.

7. The definition of the word "train" as understood by railroad men, and adopted by the American Railway Association, to-wit: "Train—An engine or more than one engine coupled with or without cars, displaying markers," does not include transfers of cars moving between yard tracks within a single terminal.

8. The conditions under which transfer of cars move between groups of yard tracks in a terminal yard, differ in different terminals, and no hard and fast rule governing such movements can be adopted as in the case of movements of road trains, and the rules and regulations under which such movements should be made must necessarily be left to the judgment and wisdom of the persons in charge of the various terminals where such movements are made.

ARGUMENT.

The sections of the Safety Appliance Act as amended, which are alleged to have been violated by the movements referred to in the second, third and fourth counts of the complaint, are Section 1 of the Original Act, as amended in 1896, 29 Stat. at Large, 85; 3 U. S. Comp. Stat. 1901, page 3174, and Section 2 of the Amendment of 1903, 32 Stat. at Large, 943; U. S. Comp. Stat. 1901, Supplement 1911, p. 1315.

Section 1 of the original acts, as amended, is as follows (italics are ours):

> "Be it enacted, etc., That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use *on its line any locomotive* engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to *run any train* in such traffic after said date that has not sufficient number of cars in it so equipped with power or train brakes that the engineer on the *locomotive* drawing such *train* can control its *speed* without requiring *brakemen* to use the common hand brake for that purpose."

Section 2 of the Amendment of 1903, is as follows (italics are ours):

> "That whenever, as provided in said Act, *any train* is operated with power or train brakes, not

> less than fifty per centum of the cars *in such train* shall have their brakes used and operated by the engineer of the locomotive drawing such *train;* and all power-braked cars in such *train* which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any *train* required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirements of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

The order of the Interstate Commerce Commission made November 15, 1905, in pursuance of the provisions of the foregoing section, is as follows (italics are ours):

> "It is ordered: That on and after August 1, 1906, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any *train* is operated with power or train brakes, not less than 75 per centum of the cars in such *train* shall have their brakes used and operated by the engineer of the *locomotive drawing such train,* and all power braked cars in every such *train* which are associated together with the said 75 per centum shall have their brakes so used and operated."

It will be observed that the foregoing provisions of the Act relate to *trains* and not to *cars,* that is, they provide for the use and operation of airbrakes on *trains* under certain circumstances. The other provisions of

the Act not hereinabove set forth, relate to *cars*, and not to *trains*, that is, they require that *cars* shall be equipped with certain appliances. By the terms of the Act, a marked distinction is made and intended to be made between the requirements relating to the use and operation of airbrakes on *trains*, and the requirements relating to the equipment of *cars* with certain appliances. The Act makes the *train* the unit in requiring the use and operation of air brakes, and makes the *car* the unit in requiring certain appliances, such as coupling devices, grab irons, etc., to be provided.

The judgment of the Circuit Court of Appeals on the three counts brought here for review, relates solely to the air-brake provisions of the Act, and therefore relates to *trains* as a unit, and not to *cars* as a unit.

Furthermore, the Act applies only to the *running* of trains.

In the interpretation and application of the air brake provisions of the Act, these questions necessarily arise at the outset:

What is a *train*, within the meaning of the Act? and

Under what circumstances does the movement of engines and cars on a railroad track constitute the *running* of a train within the meaning of the Act?

It appears from the evidence in this case that there are two entirely separate and distinct classes of movements of engines and cars on railroad tracks, to-wit:

First. Movements where engines and cars are coupled and made up in the form of a *train* with markers and are *run on the main line* at a high rate of speed from station to station, as a single unit, under schedules, under the control of train dispatchers and in charge of road crews for the purpose of accomplishing the main function of the carrier—that is, the transportation of commerce from station to station and from state to state.

Second. Irregular movements of engines and cars within a terminal yard for the purpose of assembling and breaking up trains, classifying and receiving cars from and delivering them to the industries which are being served by the carrier, these latter movements being merely incidental to the transportation of commerce from station to station and state to state, and being made at slow speed at irregular intervals from time to time without schedule, as the switching crews which control them find it necessary to make such movements, and passing from one yard track to another, backwards and forwards as conditions require, being governed only by yard rules and not being made up in any particular manner, but merely performing work preliminary or supplementary to the principal movements of trains out on the line.

The former class of movements are frequently described and referred to as "main line movements," or "movements out on the road." The latter class of movements are usually described and referred to as "switching operations," or "switching movements."

It is conceded that the air-brake provisions of the Act relate to the former class of movements, and the questions in this case arise in connection with the latter class.

Increase in railroad traffic has necessarily increased the size of terminal yards, which are made up of assembling tracks, receiving tracks, classification tracks, delivering tracks, team tracks, storage tracks and tracks for other similar purposes. As terminal yards have grown, the number of cars that have to be transferred from one group or system of yard tracks to another has increased, and the distance between groups or systems of yard tracks in one terminal yard has been extended. The result is that in recent years some of the switching operations necessarily carried on in a terminal have become more extensive than in former years.

It does not appear from the evidence that there is any clear line of demarcation between what may be termed "ordinary switching operations" taking place within a group of yard tracks, and switching operations which consist of the transfer of a "drag" or "string" of cars from one group of yard tracks to another within the same terminal yards. In the latter class of switching operations, the cars are necessarily picked up one at a time and then transferred in a string to another group or system of yard tracks, where they are then classified and distributed a few at a time to different trains or to various industries.

The Government apparently is seeking to create a distinction and to fix a line of demarcation between ordinary switching operations which take place entirely within one system or group of tracks, and more extended switching operations which consist of picking up cars one at a time at various points within a group of yard tracks, and then transferring them to another group of yard tracks in the same terminal yards and distributing them one at a time at various points in the latter group of yard tracks.

It is by no means clear from the evidence in this case that there can be any distinct line of demarcation between the two kinds of switching operations referred to. They necessarily merge one into the other, and are more or less distinct, depending upon the conditions in the general terminal yards where they are made, the size of the yards, the distance from one group of yard tracks to another, and the topography of the country where the terminal yards are situated.

However, for the purpose of this discussion, movements within a single group, or system of tracks, will be referred to as "ordinary switching operations," and movements from one group or system of tracks to another within the same terminal yards or system, as "movements of transfers of cars," or "extended switching movements."

It is conceded by the Government that the air-brake provisions of the Safety Appliance Act do not apply to "ordinary switching movements." On page 13 of its brief the Government says (our italics):

> "The Government agrees that 'it is not a wrangle over mere names' and *maintains that the question whether or not a bona fide switching movement falls within the act is not present in this case,* but that the question presented is—Do the movements, by whatever name described, of said transfer trains, expose their trainmen, the public, and interstate commerce, to the dangers from which Congress sought and intended to exclude them?"

In the case of *Erie R. Co.* v. *United States,* 197 Fed. Rep. l. c. 288, in which the same question was involved, Judge Buffington, in his opinion, states and says as follows:

> "It is conceded by the government that this act does not apply to, or at least has never been enforced as to switching operations. Manifestly such is the reasonable construction of the act."

The Government in its brief filed in the case of *Atchison, Topeka & Santa Fe Railroad Co.* v. *U. S.,* 198 Fed. Rep. 637, said as follows (italics ours):

> "Such movements as are disclosed in the evidence as to these counts cannot properly or fairly be designated as yard movements. There were yard movements before the train reached Corwith. There were yard movements when the cars were distributed at the 18th Street Yard. *As to such yard movements strictly so called, it might not be practical to require the coupling up of the air."*

Since the Government thus concedes that the air-brake provisions of the Safety Appliance Act do not apply to what are termed "ordinary switching movements," and that the question as to the application of such provisions

to "ordinary switching movements" is not involved in this case, the only question with which we are concerned is whether the air-brake provisions of this Act can be applied to more extended switching movements consisting of transfers of cars from one group or system of tracks to another group or system of tracks, all within one terminal yard. Assuming, therefore, that the air brake provisions of the Act do not apply, and concededly cannot be applied to "ordinary switching movements," we will not discuss the application of such provisions to those movements, except insofar as such discussion may throw light upon the question whether the air brake provision can or should be applied to more extended switching movements.

Just why the air brake provisions of the Act should be applied to one form of switching operations, when they concededly do not and cannot be applied to another form of such operations is not made clear by the Government in its brief, and nowhere does it call attention to any terms or provisions in the Act which specifically include the more extended switching movements consisting of transfer of strings of cars from one point to another within a terminal yard, and neither do we find any clear, logical statement of any rule of interpretation whereby the terms of the act can properly be construed to include such movements. Apparently, the Government is arbitrarily asking the court to construe the air brake provisions of the Safety Appliance Act so as to include extended switching movements, although there is nothing in

the act to warrant such construction. This is nothing more nor less than asking the court to usurp the functions of Congress.

As a matter of fact, there is scarcely a rule of construction known to the law, which, when applied to the facts of this case, does not clearly and unequivocally *exclude* all switching operations, both ordinary and extended, from the air brake provisions of the Safety Appliance Act.

A consideration of the terms of the Safety Appliance Act itself and of some of the familiar rules for the construction and interpretation of statutes as applied to the facts of this case, and of the decisions relating to the air brake provisions of the Act, leads irresistibly to the following conclusions:

1. The transfers of cars referred to in the evivdence do not come within the specific terms and provisions of the air brake provisions of the Safety Appliance Act, nor do they come within the language and terms of the Act as a whole.

2. The general purpose, scope and object of the Safety Appliance Act necessarily excludes the application of the air brake provisions to extended switching movements of the kind in controversy.

3. The application of the provisions relating to the use and operation of power brakes to switching movements would lead to absurd, ridiculous and oppressive results, and it is apparent from the Act as a whole that this was not intended.

4. The Act has not been construed by those entrusted with the enforcement thereof, so as to include switching operations.

5. The decisions of appellate courts relating to the application of the air brake provisions of the act to switching operations are contrary to the contentions of the Government.

These will be discussed in the order named.

I.

The transfers of cars referred to in the evidence do not come within the specific terms and provisions of the air brake provisions of the Safety Appliance Act, nor do they come within the language and terms of the Act as a whole.

It is perfectly obvious from the verbiage of the statute itself that Congress never intended that the Act should apply to switching movements. The terms of the Act are not such as to evidence such an intent, but rather indicate directly the contrary as clearly as could be indicated without a specific exception of switching movements. The Act forbids the railroad

> "to use *on its line* (not in its switch yards or terminals) any *locomotive* engine (not switch engine) in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to *run any train* (not *switch* any drag or transfer of cars) in such traffic after said date, that has not a sufficient number of cars in it so equipped with power or

> train brakes that the engineer on the *locomotive* (not *switch* engine) drawing such *train* (not drag or transfer of cars) can control its *speed* without requiring *brakemen* (not switchmen) to use the common hand brake for that purpose."

The Act could not have been drawn so as to be more consistent with the idea that it was intended to exclude *switching movements* so far as the operation of train brakes is concerned. Among railroad men and the public generally, the railroad's *line*, is not understood to mean the *switch yards*. The railroad's *line* is its *main* track extending from station to station. The word "train" as understood by railroad men, certainly does not include movements in switch yards. Railroad men and the public generally know that *brakemen* have to do only with trains *out on the road* and not with movements in switch yards. Movements in switch yards are handled by *switchmen* only. The purpose to be accomplished is the *control* of the *speed* of *trains*. High rates of *speed* are attained out on the *main line*, not in switch yards and terminals. It thus appears from the terms used in the Act itself that it was not intended to apply to movements in switch yards so far as the operation of train brakes is concerned.

This argument cannot be better stated than in the language of Judge Buffington in the case of *United States* v. *Erie Railroad Co.*, 212 Fed. l. c. 860, where he says (italics are ours):

> "Indeed, a careful study of this act shows the use in the statute of terms and words which in com-

mon use are applied to *road,* as contrasted with *switching,* operations. The act deals first with the locomotive alone as distinguished from the train. It makes it unlawful for the railroad 'to use on its line'—and line, main line, is a word which, in the common speech of railroad work, distinguishes the *line of the road* from *switches* and *terminal yards.* But the act proceeds, 'to use on its line any locomotive engine in moving interstate traffic.' Surely the words, 'in moving interstate traffic,' in connection with the use of a locomotive on its line, is aptly applied to draft of trains in their transit between states. But the act proceeds, the locomotive *'on its line'* which is 'moving interstate traffic' must be equipped with 'appliances for operating the train-brake system, mean that the system, the train-brake system, operated by the locomotive *'on its line"* and in 'moving interstate traffic,' refers to a *running,* rather than a *switching,* movement And the further words of the statute, which make it unlawful for the road 'to run any such train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring *brakemen* to use the common hand brake for that purpose,' are words that aptly describe train movement. The operation of 'the *locomotive drawing such train*' is in marked contrast with the push and pull of a *switching* engine, and 'control its speed,' refers to a *train* that is speeding, for the appliances must be such that 'the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.' All these terms and words of railroad parlance are applicable to line travel and fitly descriptive thereof. In railroading, *'line'* is contrasted with *'switch,' 'yard,'* and *'terminal;'* main

line, branch line, with switches. A 'locomotive drawing such train' is in contrast with the push and pull of a yard switching engine."

Manifestly the logic of this argument applies alike to *ordinary switching movements* within a single system of yard tracks, and to more extended *switching movements* consisting of transfers of cars from one yard track to another.

Furthermore it appears from the Act as a whole, and the purpose and object to be accomplished thereby, that the word "train" is used in its technical sense as understood by railroad men; and the word "train" as used in its technical sense, does not include transfers of cars of the kind referred to in the evidence herein.

While the general rule is that in the interpretation of a statute, words will be given their usual and ordinary meaning, yet when it appears that the words in the statute *have* a technical meaning; and that such statute applies to a particular trade or profession, that the statute *directly affects that trade or profession*, and that the *members* of that trade or profession will have to give the statute practical application, then the statute is construed in such a manner as to give those words their technical meaning.

It has repeatedly been held, in the interpretation of the tariff acts, that the words used in those acts, which have acquired a technical meaning in the *commercial* world will be given that meaning, because it will be presumed that Congress intended words to have the mean-

ing which they are ordinarily given by the trade or profession which is directly affected by the statute, and which must give it practical application.

U. S. v. 112 *Casks of Sugar,* 8 Pet. 277
Curtis v. *Martin,* 3 How. 106.
United States v. *Breed,* 1 Sumn. 159, l. c. 163.
Lewis, Sutherland on Statutory Construction, Vol. 2 (Sec. Ed.), Sec. 395 (254), pages 753-754.

See also:

U. S. v. *Patterson,* 150 U. S. 68.
Arthur v. *Morrison,* 96 U. S. 108.
Lawrence v. *Allen,* 7 Howard, 765.
U. S. v. *Weise,* 2 Wall. Jr. (C. C.) 72.
Elliott v. *Swartout,* 10 Peters, 137.
State v. *Murlin,* 137 Mo. 306.
State v. *Railroad,* 219 Mo. 156.

In his work on Statutory Construction above referred to, Sutherland says (italics are ours):

> "Words in common use, and also having a technical sense, will, in acts intended for general operation, and not dealing specially with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest. *Such words, however, will be understood in a technical sense when the act treats the subject in relation to which such words are technically employed.* Thus they are deemed technically used in legislation relating to courts and legal process. Thus for example the word 'party' has a technical significance. So have the words 'action,' 'suit' and 'final judgment.' * * *
>
> If a word is technical and used in a technical or conventional sense, it is to be construed according-

> ly, but its interpretation may then involve an inquiry into its technical meaning as a matter of fact. *Such laws are intended for practical application to men engaged in avocations in which the words have acquired a special meaning by usage.* Such statutes are to be construed according to the conventional understanding of the terms used."

It appears beyond any shadow of a doubt in the case at bar, that the word "train" has acquired a meaning among railroad men which is peculiar to that profession. In railroad parlance, "a train is one or more engine coupled with or without cars, displaying markers," and is made up *to go out on the road.* No railroad man understands a switch "drag" or a "transfer" or "string" of cars to be a *train.* It is obvious that the Safety Appliance Act must be given practical application *by railroad men,* and that the statute applies directly to *railroad men,* as a profession, and the act is *not* one which directly affects the public generally, or which has to be given application by the public. *The practical application of the act must be made by railroad men,* and under the rules of interpretation adopted by this court, and as a matter of common sense, it must be presumed that the words used in the statute were intended to have the meaning which *railroad men* generally understand them to have.

Not only is the definition of the word "train," hereinabove referred to, one which is recognized by all railroad men, but it is the definition which is authorized, adopted and promulgated under the rules of the American Railway Association. It appears from

Section 5 of the Safety Appliance Act itself that the American Railway Association is authorized by Congress "to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars," and the certificate of that association is made final on that point. Since the entire Act is to be given practical application by railroad men alone, and not by the public generally, and since Congress has recognized the authority of the American Railway Association as an organization which is qualified to pass upon matters of this kind, there is not the slightest room for a reasonable doubt that Congress intended to use the word "train" in the sense in which it is understood by railroad men, who alone have to give the Act practical application.

Under the foregoing definition, "drags" and "cuts" of cars which are pushed and pulled back and forth within a group of yard tracks or which are being switched from one group of tracks to another in the same terminal yards, as in the case at bar, cannot be said to be *trains*, because they do not come within the meaning of the word "train" as used in the Act—they do not display markers, are not made up to go out on the road, and are not operated by road crews, but are merely *switching movements* which are incidental to the assembling and breaking up of "trains," which do go out upon the road and are made up with markers displayed and are in charge of road crews.

It appears that in other cases where the meaning of the word "train" has come before the court for consideration, where the application of the word must be made by railroad men, the court has given the word "train" the meaning understood and applied by railroad men.

Chicago & Eastern Ill. R. R. Co. v. *Maloney*, 77 Ill. App. 191.

Lynch v. *Great Nor. Ry. Co.*, 112 Minn. 382; 128 N. W. 457.

Jones v. *Pierre-Marquette R. R. Co.*, 168 Mich. 1; 133 N. W. 993.

In the case of *Chicago & Eastern Illinois Railroad Company* v. *Maloney, supra*, it appears that a statute of the State of Illinois provided as follows:

> "No railroad corporation shall run or permit to be run upon its tracks, any train of cars, for the transportation of merchandise or other freight, without a good and sufficient brake attached to the rear of hindmost car of the train, and a trusty and skillful brakeman stationed upon said car, unless the brakes are efficiently operated by power applied from the locomotive."

It was held that the evident intent of this statute was to apply to trains running from one place or station to another, *and not to a switching movement of cars in a freight yard.* The appellee's intestate was employed as a laborer in a railroad freight yard in Chicago, and his duty was to clean snow and ice from the switches. While thus engaged, he was struck by the rear end of a train of fourteen cars being pushed by a locomotive. It was the purpose of the crew in charge of

these cars to back the train through the switch wherein Maloney was working, to another part of the yard. In holding that there was no liability on the part of the Company, the court said (italics ours):

> "Under the facts in the case at bar, this statute has no application. *This section is not intended to control the making up of trains in the yard of a railroad company.*
>
> "The making up of a train by a railroad company in its yard at a terminus is not running 'upon its railroad a train of cars for the transportation of merchandise or other freight.' We cannot concede that because the cars being switched in the appellant company's yard were loaded with coal, they were therefore then being used for the 'transportation of merchandise' within the meaning of this statute. *This section of the statute was evidently intended to apply to trains running from one place or station to another. A few cars being switched about in a freight yard are not a 'train' in the sense that word is there used.*"

In the case of *Lynch* v. *Great Northern Railway Company, supra,* the plaintiff was injured while employed as a switchman, and brought suit to recover damages for such injuries. It was contended by the defendant that the plaintiff violated certain rules of the Company. In discussing this phase of the case, the court said, as follows (italics ours):

> "The rules claimed to have been violated are those adopted by the company for the guidance and regulation of the conduct and duties of employes engaged in the freight train service. The rules are published in pamphlet form, and those

claimed to have been violated appear therein under the heading 'Freight Conductors,' one of which makes it the duty of such conductors to know that the cars of their trains have been inspected and that the air brakes are in working order, and to report any neglect on the part of the inspectors to the superintendent. Subdivision (b) of this rule provides that the conductors 'must, with the assistance of their brakemen, make an examination of the brakes, couplings, uncoupling devices,' and other parts of each car in their train, 'so as to know that the same are in good condition,' before starting, and, further, that 'cars picked up at intermediate stations, must be examined carefully.'

"The position of defendant in this connection is that the six cars of logs became in their transit to Sauk Rapids from St. Cloud a 'train,' within the meaning of the rules, and that the switching crew in control thereof were charged with all the duties of inspection there imposed. In our opinion, the evidence made this a question for the jury. The rules upon their face do not apply to yard switchmen or yard service, but, on the contrary, are made specifically applicable to freight conductors and their brakemen, and to the general freight train service. They can be made applicable to switchmen only by construction or analogy.

There is no substantial similarity between the ordinary train service of a railroad company and switching operations in its yard, at least no such similarity as to justify the conclusion as a matter of law that they are the same. The freight train is made up of a road engine, a long string of cars, with caboose, in charge of employes hired for and engaged in the particular department, and charged with duties peculiarly applicable to that branch of the service. Switching crews are engaged in the

work of switching cars about the railroad yards, in the discharge of which the necessity of inspection of instrumentalities, such as the condition of cars moved from place to place, does not apply to the same extent as with respect to a train of cars operated for a considerable distance over the road, where there is no opportunity for examination by inspectors at local points."

In the case of *Jones* v. *Pere Marquette Railroad, supra*, the plaintiff, who was a railroad engineer, was injured in a collision between his engine and a passenger train, and brought suit to recover damages. It was contended by the defendant company that the engineer had violated certain rules, and in discussing the meaning of the word "train" the court adopted the definition as understood by railroad men and contained in the book of rules of the American Railway Association, viz:

> "Train---An engine, or more than one engine coupled, with or without cars; displaying markers."

II.

The general purpose, scope and object of the Act necessarily excludes the application of the air-brake provisions to switching movements of the kind in controversy.

There is absolutely no evidence in this case that any member of the traveling public, or that any employe was or would be endangered by reason of the movements of the transfers of cars in the manner mentioned

in the evidence. As a matter of fact, it is apparent from the evidence that the movements along the single track in question were slow and were made under complete control, so that it was not necessary even for the members of the crew to use hand brakes during such movements.

Since the air brake provisions of the Act do not relate to "ordinary switching operations," and since the extended switching operations referred to in the evidence are merely one form of switching operations, and are not movements out on the road, there is no logic in the Government's contention that the act should now be construed to apply to one form of switching operations because the Government thinks that such extended switching operations might be accompanied with more danger to the traveling public and to employes than ordinary switching movements, although there is no evidence to that effect, but the trend of the evidence is to the contrary.

So far as the employees are concerned, the application of the provisions relating to the use and operation of train brakes to switching operations would not only not *promote* the safety of the employes, but it would render their employment more hazardous and dangerous. It is a matter of common knowledge, which must have been known to Congress, that switching movements require that single cars or groups of cars shall be constantly coupled and uncoupled, in order to classify and reclassify them, to receive them from and deliver them

to connecting carriers, to deliver them to and collect them from team and storage tracks, and in order to assemble and break up trains. These movements within switch yards are slow, and can absolutely be controlled without the necessity of coupling up the full percentage of air brakes required, and the safety of the employes would not be enhanced by the coupling of the such percentage of brakes. On the other hand, if in each one of the many movements made daily in large terminals, the employes were required to couple up the air brakes on practically all cars, as they would if the Act applies, and thus to pass from car to car amidst the dangerous surroundings which necessarily exist, the dangers and hazards which they encounter would be multiplied. Thoughtful consideration of this field of work of railroad employes indicates plainly that the purpose and the scope of the Act could in no way be accomplished by enforcing it in switching operations.

While it appears, in the case at bar, that movements of the character in question are sometimes operated on the same track with passenger trains, which are also moved under yard rules, it also appears that such movements are made under such conditions that the application of the Act would not promote the safety of travelers.

Surely, if Congress had intended that the Act should be applied to this branch of railroad traffic, it would have said so in unmistakable terms, instead of enacting a law, the terms and provisions of which, in letter and

spirit, and in results to be accomplished, plainly indicate to the contrary.

The truth of the matter is that Congress did not intend to control and regulate every possible movement that might be made upon railroad tracks. It undertook to control the use of air brakes in main line movements from station to station, because those movements are made at high speed, and the conditions under which they are made are uniform throughout the country, and it was and is right and proper that in all such movements power brakes should be used. Switching movements, however, are necessarily made under varying conditions, at different times, and in different terminals, depending upon the amount of traffic from time to time, the size of the terminals, the topography of the country and other considerations which may exist. Some discretion and judgment was intended to be left to the intelligent management of the railroad, and Congress assumed, and rightfully so, that the management would take such measures and precautions in switching operations, both of the ordinary kind and of the more extended variety, as the conditions might demand. In some cases it might not be necessary to use power brakes at all. In other cases the use of some brakes would be advisable, and in other cases the use of a larger percentage of brakes would be advisable; but the use of the entire percentage of air brakes prescribed for trains out on the road in all switching operations was never intended by Congress, and there is nothing in the statute from which any such in-

tention may be deduced. On the contrary the statute as a whole indicates directly the contrary. It is a cardinal principle of interpretation that the intention of the legislative body may be deduced from the statute as a whole and from the subject matter thereof.

Kolsatt v. *Murphy*, 96 U. S. 153; l. c. 159, 160.
Lessee of Henry Brewer v. *Blougher*, 14 Pet. 178; l. c. 198.
Petri v. *Commercial Bank*, 142 U. S. 644, 650.
U. S. v. *Wilburger*, 5 Wheat. 76, 96.

It is apparent from the statute as a whole and the subject matter thereof that the air-brake provisions relate solely to the *running* of *trains* out on the *line*, not to the irregular movements of cars in switch yards; that the air-brake provisions were enacted to minimize the dangers resulting from the speed at which *trains* on the *main* line must necessarily run. The conditions under which *main line* movements and *switch* movements are made are so radically different, that in the absence of any mention of switch movements, generally or specifically, in the air-brake provisions of the Act, there is no logical basis for asserting that Congress intended or could have intended that such provisions should be applied to switch movements of any kind or character.

III.

The application of the provisions relating to the use and operation of power brakes to switching movements, would lead to absurd, ridiculous and oppressive results, and it is apparent from the Act as a whole that this was not intended.

One of the well recognized principles of the interpretation of statutes is that courts will not construe them in such a way as to lead to results which are absurd, oppressive and unjust, and beyond the scope and the purpose of the statute, when a different construction would accomplish the purpose of the act and would avoid such unreasonable results.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1, l. c. 37.
Law Ow Bew v. *U. S.*, 144 U. S. 47, l. c. 59.
Washington & Idaho R. R. v. *Coeur, etc., Railway*, 160 U. S. 77, l. c. 101.
Interstate Drainage & Inv. Co. v. *Board of Commissioners*, 158 Fed. 270, l. c. 273.

It is apparent that if the Act should be held to apply in the many switching movements which are made daily in large terminals, the vast amount of additional work to be done, would make it necessary for the railroads to employ hundreds of additional employes, to have many additional switch engines, to increase the size of their terminals, and to make many other changes which would be revolutionary in their character, and would ultimately cost the railroads many millions of dollars, without accomplishing any good purpose.

Conditions existing in terminal yards, and which obtain in connection with such work, are altogether different from those which exist in the running of *trains* out on the *line* between terminals, and it is obvious that if Congress had intended that the Act should apply to switching movements of any character, this would have been made apparent from the terms thereof, instead of using terms, as heretofore indicated, which are ordinarily understood by railroad men to apply *only* to movements of *trains* out on the road.

The terminal problem is one of the many serious problems which now confront the railroads of this country. The tremendous cost of obtaining land for terminal uses in large cities, the congestion which exists, and the increased demands for quick service, add to the difficulty.

The necessity for economizing in railroad operations is becoming more and more apparent as the cost of labor, and of all materials required in railroad construction, maintenance and operations increases, and one of the opportunities for exercising economy in operation is said to be afforded by the revising of terminal facilities.

Droege on Freight Terminals and Trains, p. 10.

The revising of freight terminals in such a way as to reduce operating expenses requires, among other things, the adoption of modern methods of switching cars.

The "push and pull" method of switching now so prevalent in many terminals is said to be neither efficient nor economical, and the author above referred to states that the poling method and the hump or summit method and gravity switching should take the place of the push and pull system whenever it is practicable or possible to do so. The poling and the hump or summit method and gravity switching are recognized as modern methods of switching which will have to be adopted in railroad freight terminals in order that the highest degree of economy may be practiced, but such methods would be out of the question if railroads were required to have all strings of cars in switching movements operated with power brakes.

Obviously, the complicated problems which already exist in the congested terminals of great railroad centers will be greatly increased if by a strained and unnatural construction, the Act is held to apply to switching movements of any kind whatever.

The Government in its brief in the case at bar, says (page 14):

> "However, the hardship is more apparent than real. *The coupling of air brakes on transfer trains would require little time, especially if done by additional yardmen reserved for the purpose and if no tests were made.* Testing of brakes would not be necessary if the railroad had theretofore performed its duty, since most of the cars constituting these transfer trains were moving in through traffic and supposedly had been previously inspected and found to be in good condition."

This statement amounts to a confession that it is impracticable to apply the air brake provisions of the Act to movements of the character involved in this proceeding.

The statute not only requires that a certain percentage of the cars in a train shall have the air brakes *used and operated*, but provides further that *all* power braked cars in such train associated with said percentage shall also have their brakes *used* and *operated* (See Section 2 of the amendment of 1903), so that if any train which comes within the provisions of the Act has all of its cars equipped with power brakes, then *all of them* must have the air brakes *used* and *operated*. Otherwise there will be a violation of the Act.

See,

In re Power or Train Brakes, 11 I. C. C. Rep. 429.

The suggestion in the Government's brief above referred to, amounts to this: that all air brakes may be coupled, but that the testing of them may be omitted, because it would be impracticable, and if they are not all *used* and *operated* under such circumstances the violation should be overlooked. The government apparently would have this court say that the Act applies to the switching transfers of cars insofar as the *coupling* is concerned, but because it is impracticable to test all of the air brakes, the court may strike out that provision of the statute which says that the brakes *must be used and operated*.

This clearly amounts to a suggestion that this court may in effect create a statute entirely different from that enacted by Congress, because under conditions existing in connection with switching transfers of cars in terminal yards, it would not be practicable to extend the air brake provisions of the Act in its present form to cover such switching operations.

IV.

The Act has not been construed by those entrusted with the enforcement thereof so as to include switching operations.

This court has repeatedly announced and applied the rule in the construction of statutes, that where the meaning of a statute is in doubt, and it has been given practical construction by the executive officers charged with the duty of enforcing it, such practical construction is entitled to great weight and consideration in the determination of the true meaning of such statute.

United States v. *Johnston*, 124 U. S. 236, l. c. 253.
United States v. *Moore*, 95 U. S. 760, l. c. 763.
Hahn v. *U. S.*, 107 U. S. 402.
Schells Executors v. *Fauche*, 138 U. S. 562 l. c. 572.
U. S. v. *Hermanos Y. Compania*, 209 U. S. 337 l. c. 339.

The original Safety Appliance Act was adopted by an Act of Congress approved March 2d, 1893, and as amended has been in effect ever since that time. The

fact that the question, whether the Act was intended to apply to *switching movements*, has not been raised or discussed until recently gives rise to the inference, which is a matter of common knowledge, that the Government has never undertaken to enforce the Act as to such movements until quite recently, when it has undertaken to apply it to movements of transfers of cars being switched from place to place within one general terminal yard.

For a period of over twenty years, those entrusted with the enforcement of the air-brake provisions of the Safety Appliance Act have not construed them as applying to ordinary switching movements, and for a period of over fifteen years they have not construed such provisions as applying to switch movements of any character whatever.

During that period this Act has been twice amended to meet new conditions, but Congress was apparently satisfied with the construction placed upon the air-brake provisions of Act applying them only to main line movements, because none of the amendments attempted to correct such construction.

In the case of *United States* v. *Johnston, supra*, Mr. Justice Harlan not only announced the rule above referred to that;

> "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

but he also made mention of the fact that Congress apparently was aware of the construction placed upon the statute in question, and did not intend to disturb it.

In the case of *United States* v. *Hermanos Y. Compania, supra,* Mr. Justice McKenna, after announcing and applying the rule above stated, said:

> "And we have decided that the re-enactment by Congress, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction."

In the case at bar, it is perfectly apparent that if Congress were dissatisfied with the interpretation which has been placed upon the air-brake provisions of the Safety Appliance Act by those in charge of the enforcement thereof in that they have not for years attempted to apply them to ordinary switching operations there has been ample opportunity to amend the Act. This has not been done, and apparently the construction adopted accords with the contentions of Congress. The recent attempt to apply the air-brake provisions to extended switching operations as in the case at bar is without logical basis, and is an arbitrary attempt to widen the scope of such provisions beyond the manifest intent of Congress and the long time practice of the Interstate Commerce Commission.

Not only has the Interstate Commerce Commission uniformly construed the Act not to apply to ordinary switching movements, but in the hearings that have been held at the time that the percentage of air brakes required

to be used and operated was increased, the Interstate Commerce Commission has considered main line movements only, and has never considered the conditions and circumstances which exist in connection with movements within terminal yards. We especially call the court's attention to the language used in discussing the advisability of raising the percentage of cars in trains which must have their brakes used and operated from fifty per cent to seventy-five per cent, in the proceeding entitled "*In re Power or Train Brakes,* 11 Interstate Commerce Commission Reports, 429." Throughout the entire discussion, it is apparent that the Interstate Commerce Commission had in mind movements on the main line. It had no thought of switching movements. It appears from the opinion of the Commission in that proceeding that the railroads were intending to and did co-operate with the Commission to the end that *main line* movements might be made as nearly safe as possible, but no mention was made of movements within terminal yards, and such movements were not discussed nor considered, because neither the Interstate Commerce Commission nor any of the railroads considered such movements to be within the air brake provisions of the Safety Appliance Act.

V.

The decisions of the appellate courts relating to the air brake provisions of the Safety Appliance Act are contrary to the contentions of the Government.

As heretofore stated, the provisions of the Safety Appliance Act include two separate and distinct matters: First, the requirements relating to the equipment, use and operation of power or train brakes, on *trains*, and second, the equipment of *cars* with coupling devices, grab-irons, draw-bars, etc. There is no decision of this court holding that the requirements as to the equipment, use and operation of power and train brakes on *trains* applies to switching movements of any kind or character, and there is no decision of any Appellate Court, so far as we are aware, holding that the requirements as to the equipment, use and operation of power and train brakes applies to switching movements of any character, unless it be in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 198 Fed. 637, which case is relied upon by the Government. That case does not discuss the question as to the proper interpretation of the statute generally, but simply construes the movement involved to be a main line movement of a train, without giving serious consideration to the meaning of the terms of the statute and the general scope, purpose and intent thereof, as indicated by the Act as a whole. It does not appear from the court's opinion whether the movements were being made al-

together within one general terminal yard of one company, nor does it appear whether the transfers were displaying markers so as to come within the definition of the word "train." In fact, most of the vital questions which must determine whether or not the Act applies to this class of traffic were not discussed in that case.

Manifestly, that case cannot be regarded as authoritive upon the precise question under consideration, in the light of the well reasoned and well considered decisions of the Circuit Court of Appeals in this case (211 Fed. 12), and of the Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Erie Ry. Co.*, 212 Fed. 853, and in the same case on a former appeal, 197 Fed. 287; in all of which the question at issue was squarely presented and decided.

The Government cites in its brief (page 9) the following decisions of this court construing the provisions of the Safety Appliance Act, which require that *cars* be equipped with automatic couplers, grab-irons, draw-bars, etc.

Southern Ry. Co. v. *Crockett*, 234 U. S. 725.
Delk v. *St. L. & S. F. R. R. Co.*, 220 U. S. 580.
C. B. & Q. R. R. Co. v. *United States*, 220 U. S. 559.
St. Louis I. & S. Ry. Co. v. *Taylor*, 210 U. S. 281.

As heretofore pointed out, the decisions construing that part of the Act requiring certain equipment for *cars*, have no application to that part of the Act requiring the use of power brakes on *trains*.

In the case of *C. B. & Q. R. R. Co.* v. *U. S.*, 220 U. S. 559, this court very pointedly limits the scope of that part of the decision which relates to automatic couplers in the following language (220 U. S. l. c. 577, italics are ours):

> "In view of these facts we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act *so far as it relates to automatic couples* on trains moving in interstate commerce, and open to further discussion here."

The Government also cites the case of *U. S.* v. *Pere Marquette R. Co.*, 211 Fed. 220. That case was decided by the District Court for the Western District of Michigan, and is based upon a misapprehension and a misconception of the scope of the decisions of this court, construing the provisions of the Act relating to equipment of cars.

In the case of *United States* v. *New York Central & H. R. R. Co.*, 205 Fed. 428, the court held that a movement of thirty-nine freight cars under circumstances very similar to the case at bar was a switching operation, and that the Safety Appliance Act was never intended to apply to switching operations. The court says (page 429):

> "The primary object of the statute was to require railroads to equip trains engaged in interstate traffic with air brake appliances, so as to minimize the dangers to the passengers and crews; but obviously it was never intended to require such appliances to be coupled up or connected while cars are

being hauled by a switching engine from one yard to another, or shunted out at different points, and are not actually engaged in interstate traffic."

Judge Amidon in his opinion in this case, 211 Fed. l. c. 18, strikes the key note to the situation when he points out that the air-brake sections of the Federal Appliance Act were not intended to apply to switching operations, and that the mere fact that those operations have been extended since the passage of the Act does not authorize the courts to extend the application of the Act, but that this is a matter for Congress. Upon this subject he says (211 Fed. l. c. 18, italics ours):

"Because of these results, as well as from the language of the statutes, we are of the opinon, that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching operations. But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the next conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars, moved by a switch engine from one yard to another in the breaking up and making up of trains, shall be subject to the air-brake provisions of the Safety Appliance Acts, Congress ought so to provide. The whole question turns upon two points: *First, do the air brake provisions of the Safety Appliance Acts apply to switching operations? Second, was the movement of the strings of cars here involved a good faith switching operation? We are satisfied that the movement of these trains was as genuinely a switch-*

> *ing operation as the old movement when terminal yards were less extended than they are now.* Being of that opinion, and that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching movements, we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff."

In the case of *United States* v. *Erie Railroad Co.*, 212 Fed. l. c. 860, Judge Buffington says (italics ours):

> "It would seem, therefore, that none of these cases involved the question here involved, namely, the compulsory use of air-brake equipment in switching operations. On that question, which is one of statute construction, we hold the act does not compel the air coupling of cars in switching movements. We so hold, amongst others, for these reasons: *First, because had Congress meant to compel air-coupled switching, it would have said so; second, by providing automatic coupling Congress had already provided as far as it could against the avoidable dangers incident to switching; third, if the law includes switching, and Congress meant to except any switching therefrom, it neither did nor by language made it possible to now decide what switching was excepted.*"

Conclusion.

It is conceded by the Government that the air-brake provisions of the Safety Appliance Act do not apply to ordinary switching operations. The evidence establishes conclusively that the movements in question were not main line movements, but were merely a part of the switching operations of the railroad company, each consisting

~~in part~~ of a movement from one point in a terminal yard to another in the same yard. There is nothing in the statute which brings such movements within the scope of the Act, and there is nothing in the circumstances under which the movements were made that requires its application. Clearly, if the Government thinks that this class of switching movements, which is by no means a distinct class of movements, should be brought within the scope of the statute, then it should appeal to Congress and not to the courts. It is apparent, however, that Congress intended that the use of air brakes in all switching operations should be left to intelligent railroad management. Congress presumably recognizes that conditions existing in terminal yards vary in different parts of the country. In some cases the movements from one group of tracks to another in a terminal yard would be a few hundred yards, and in others the distance would be greater. If the entire percentage of cars, and all power-braked cars associated with them, must be coupled in such movements, then revolutionary changes must be made in regard to movements in railroad terminals at an enormous cost. Congress did not intend this. There is no mischief existing in connection with these movements which it is necessary to remedy. The railroad management has provided against and should be permitted to provide against the dangers which arise under different circumstances in different terminal yards. As heretofore pointed it appears that the railroad companies are in good faith at-

tempting to co-operate with the Interstate Commerce Commission, in order that the purpose of the statute may be carried out in main line movements. They should not be harassed with an attempt to apply the statutes to movements to which Congress did not intend they should apply, and especially when such application would be impracticable, oppressive, expensive, and no good would be accomplished thereby.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 630.

THE UNITED STATES, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

Owing to lack of time, due to the fact that the Government was about ten days late in serving its brief herein, the "Brief on Behalf of Respondent," heretofore filed, was limited to a discussion of and answer to the points and argument advanced by the Government under the single specification of error relied upon by it in its brief, to wit, "that the Circuit

Court of Appeals erred in reversing the judgment of the trial court, directing a verdict in its favor, and in holding that the transfer movements in question were switching operations and not within the purview of the safety appliance acts" (Government's Brief, p. 4).

We think, however, that attention should be called to the fact that the record shows, in reference to the second, third, and fourth counts of the complaint here involved, that certain assignments of error were presented to the Circuit Court of Appeals by respondent in addition to those arising in connection with the giving of peremptory instructions to the jury on behalf of the Government and the refusal thereof on behalf of respondent, although the latter were the only ones which it became necessary for the Court of Appeals to discuss under the conclusions reached by it.

We desire also to call attention to some additional authorities in support of the propositions advanced in our original brief.

Assignments of Error Presented to Circuit Court of Appeals by Respondent.

The respondent in the proceedings before the United States Circuit Court of Appeals duly assigned as error the action of the trial court in refusing to instruct the jury peremptorily to return a verdict in its favor upon the second, third, and fourth counts of the complaint, and in giving to the jury peremptory instructions to return a verdict in favor of the Government on those counts. See assignments of error II, III, IV, VI, VII, VIII, and XIII (Record, pp. 95-99).

As stated before, the conclusion which the Court of Appeals reached as to those assignments of error was such that it did not find it necessary to discuss other errors assigned relative to the second, third, and fourth counts.

However, in addition to the foregoing assignments of

error, the respondent asserted and maintained in its assignment of errors, duly presented to the Court of Appeals, that the trial court committed errors as follows (see assignment of errors, Record, p. 98):

"XI.

"In that at the close of the trial when the cause was submitted to the jury, the court denied the motion and request in writing then and there made by the defendant, to charge the jury as follows:

" 'No. 7.

" 'The court instructs and charges the jury that if you shall believe that the cars referred to in the second, third, and fourth counts of the complaint, and also referred to by the witnesses as "drags," "cuts," or "transfers" were moved or hauled by the defendant upon its own track and wholly within its own switch yards, and that the only movements thereof were switching movements necessary to be made in the breaking up of trains coming into such switch yards, and the making up of trains to depart therefrom, then you should return a verdict in favor of the defendant on said second, third, and fourth counts.'

"To which action of the court, in refusing to so instruct and charge the jury, the defendant then and there excepted and now assigns the same as error."

"XII.

"In that at the close of the trial, when the cause was submitted to the jury, the court denied the motion and request in writing then and there made by the defendant, to charge the jury as follows:

" 'No. 8.

" 'The court instructs and charges the jury, relative to the second, third, and fourth counts or causes of action set forth in the complaint, that if you shall

believe from the evidence that none of the strings of cars referred to in the complaint, and referred to in the testimony as "drags," "cuts," or "transfers" were "trains," then it is your duty to return a verdict as to each and every of said second, third, and fourth counts in favor of the defendant. And in this connection the court further instructs and charges you that if you shall believe from the evidence that in the railroad business the word "train" has, among railroad men and in railroad parlance in the United States, a fixed, definite, and technical meaning, and so had such meaning on and before March 2, 1893, then it will be and is your duty to apply and to give that word, as used herein and in other parts of these charges and instructions, such meaning, and if, by using and applying such meaning, you shall find and believe that none of the strings of cars above referred to constitute a "train" in such railroad parlance, then it is your duty to return a verdict in favor of the defendant company as to each and every of said second, third, and fourth counts.'

"To which action of the court, in refusing to so instruct and charge the jury, the defendant then and there excepted, and now assigns the same as error."

It is apparent from its opinion herein, that the court of appeals considered the evidence relating to the second, third, and fourth counts of the complaint as though no issues of fact were presented, and we think properly so. The Government has likewise so treated the evidence in its brief. Under the evidence in this case we believe that it is not possible to come to any other conclusion than that the movements in question were switching operations, pure and simple, and that the strings of cars in question were not "trains" within the meaning of the safety appliance act, but if this court should differ with the court of appeals in any of its conclusions upon the assignments of error discussed by it, we desire to have further consideration given to the other assignments of error presented and relied upon.

We do not for a moment concede that there can be any

doubt as to the correctness of the conclusions reached by the court of appeals, but desire merely to call attention to the fact that after the court refused to give the peremptory instructions requested by the respondent, respondent then asked that certain questions be submitted to the jury by appropriate instructions, which instructions were also refused, and the refusal thereof was assigned as error. Undoubtedly the trial court committed error in refusing to give the peremptory instructions requested by respondent, but after such refusal it should at least have given instructions number 7 and 8 above referred to.

Erie Railroad Co. *vs.* United States, 197 Fed., 287; l. c. 290, 291.

Some Additional Authorities.

On page 39 of our original brief we mentioned the fact that there are two distinct classes of movements on railroads, to wit, "main-line movements" and "switching movements." This distinction was recognized by the Circuit Court of Appeals for the Third Circuit in the case of Erie Railroad *vs.* United States, 197 Fed., l. c., 288, 289, where the court said:

> "Indeed the court in its observation of the practical operation of railroads takes judicial notice of the fact that the transportation work of a great modern railway covers two distinct fields of operation: One, the hauling of trains in transit, and the other the assemblage and distribution of the cars into such trains at terminal points."

On pages 41 and 42 of our original brief we stated that it is practically conceded by the Government that the air-brake provisions of the safety appliance act do not apply to ordinary switching operations. We desire to call attention to the fact that this was specifically conceded by Judge Hook in his dissenting opinion in the case at bar, upon which opinion the Government relies. (See p. 117 of the record; also 211 Fed., 12, l. c., 20.)

Judge Hook says (211 Fed., 20):

> "Defendant's contentions which the court sustains are, *first*, that the train-brake provisions of the safety appliance acts (27 Stat., 531; 29 Stat., 85; 32 Stat., 943) do not apply to switching operations; *second*, that the movements of the cars in question were of that character. I will not stop to consider the first of these, except to say that in some switching operations compliance with the requirement in question may be impracticable, and for that reason may not have been enforced as to them."

On pages 50 and 51 of our brief we called attention to the fact that Congress had authorized the American Railway Association to designate the standard height of drawbars, and thus recognized the authority and standing of the association. This court has also recognized the authority of this association.

See:

St. L. & I. M. Ry. *vs.* Taylor, 210 U. S., l. c., 286.

On pages 55 to 59 of our brief we called attention to the fact that movements of the character in question do not come within the mischief which Congress was seeking to remedy. This court recently held to the same effect in construing another provision of the same act. In holding that the act does not require an automatic coupling between the engine and tender of a locomotive, the court stated that the coupling between the engine and tender was "not either within the mischief or remedy of the act."

Pennell *vs.* Railroad, 231 U. S., l. c., 678 (bottom of page).

On page 64 we stated that the air-brake provisions of the act have been construed by those entrusted with the enforcement thereof so as not to include switching operations, and that such construction is entitled to great weight. In addi-

tion to the authorities there cited, we call attention to the language of this court in the case of Pennell *vs.* Railroad, 231 U. S., l. c., 680, where Mr. Justice McKenna says:

> "We need not refer to them (plaintiff's contentions) with further detail except to say that the custom of railroads could not, of course, justify a violation of the statute, *but that custom having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute.*
>
> "Under the various safety appliance acts the Commission is charged with the duty of prosecuting violations of them which come to its knowledge, and by the sundry civil appropriation act of June 28, 1902, c. 1301, 32 Stat., 419, 444, the Commission was authorized to employ inspectors to execute and enforce the requirements of the acts. It is of special significance, therefore, that in its order under the act of April 14, 1910, c. 160, 36 Stat., 298, which was supplemental to the other acts, designating the number, dimensions, location, and manner of application of certain appliances, it provided as follows: 'Couplers: Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.' That is, couplers were required where danger might be incurred by the employees."

In this connection we desire also to call specific attention to the following language used by Judge Amidon in his opinion in the case at bar (Record, p. 113; also 211 Fed., 12, l. c., 17):

> "It is not controverted by the Government that the provisions of the safety appliance act in regard to air brakes have not heretofore been regarded as applicable to switching operations. *This has been the interpretation of executive officers charged with the enforcement of the act and is justified by the language of the statute.* The words 'on its line,' in 'moving interstate traffic,' 'to run any such train in such traffic,' are properly applicable to trains moving from point to point rather than switching operations. We do not think the act of 1903 was intended to make any

change in the original statute in this respect. That statute was passed to correct the decision of this court in the case of Southern Pacific Railway Co. *vs.* Johnson (117 Fed., 462) and was mainly declaratory. Johnson *vs.* Southern Pacific, 196 U. S., 1, 21."

The Erie and Santa Fe Cases.

There appear to be only two cases in which questions similar to those in the case at bar, involving a construction of the air-brake provisions of the safety appliance act, have come before any appellate court, to wit, the cases of United States *vs.* Erie Railroad Co. (C. C. A., Third Circuit), 212 Fed., 853, and A., T. & S. F. Ry. Co. *vs.* United States (C. C. A., Seventh Circuit), 198 Fed., 673. The Erie case was also before the same court on a previous appeal (197 Fed., 287). The second judgment of the Court of Appeals in the Erie case is now before this court for review (No. 580 on the docket for this term).

In the Erie case it was held by the Court of Appeals for the Third Circuit that the air-brake provisions of the statute in question do not apply to switching movements, and that the movements involved were *bona fide* switching movements.

In the Santa Fe case the court did not specifically decide whether the air-brake provisions of the act are applicable to switching movements, but, without discussing the general scope, purpose, and meaning of the air-brake provisions of the act, held that the precise movements involved in that case came within those provisions.

We apprehend that the decision of this court in the Erie case and in this case will depend upon a determination of the single broad proposition that the air-brake provisions of the act either do or do not apply to extended switching movements between different points within the same terminal yards, as in this and the Erie cases, it being conceded that those provisions of the act do not apply to "ordinary switching operations," and no question as to such operations is involved.

It is conceivable, however, that this court, after announcing the rule applicable generally, may hold further that whether the movements involved in a particular case are or are not *bona fide* switching movements will depend upon a consideration of the circumstances under which such movements are made, as shown by the evidence in each particular case.

It is, therefore, perhaps not out of place to point out that the movements involved in this case, as shown by the evidence, are even more distinctly and characteristically switching movements than in the Erie case, and much more so than in the Santa Fe case.

In the Erie case the "drags" or movements involved were made up with "markers" of a certain character, because of the necessity of their passing through a tunnel, while in the case at bar the movements involved were made up without a caboose and without markers of any kind or character, *but were made up as all other switching movements.* In the Erie case each of the three places, making up together the terminal yards, was a freight station, having its own published rate, whereas in the case at bar the parts of the yards between which the movements were being made were all in and around the single station of Kansas City, and were not markedly different from all switching movements which took place there. In the Erie case the movements appear to have been operated by special switching crews used for extended switching movements, whereas in the case at bar the movements were made by the same switching crews that did all classes of switching.

The movements in the Erie case were undoubtedly *bona fide* switching movements. There is even less room for doubt, if that be possible, that the movements involved in this case were *bona fide* switching movements.

In the Santa Fe case it appears that the Corwith yard was a terminal entity of itself, and that the Eighteenth Street yard was a terminal entity of itself; that the distance between

the two yards was about eight miles, and that the movements involved were between the two yards. It does not appear where the terminal yard limits were, how the movements were made up, whether they carried markers or cabooses, or what the conditions were generally, which would determine whether such movements were "main-line movements" or "switching movements." In the case at bar it appears that the Twelfth Street yards and Murry yards were operated together as a single terminal entity; that neither yard was complete in itself as a switching unit; that they were both within the terminal yard limits—were, in fact, one yard, except that the river separated them—and that all of the conditions existed in the making of the movements in question which necessarily characterized those movements as "switching movements" as distinguished from "main-line movements."

Summary of Argument.

The argument on behalf of respondent may be summarized as follows:

1. The air-brake provisions of the safety appliance act relate to *trains* as a unit, whereas other provisions of the act relate to *cars* as a unit.

2. The air-brake provisions of the act relate to the *running* of trains, whereas other provisions relate to the *hauling* of cars.

3. There is a marked distinction between the *running* of *trains* and the *hauling* of *cars* and decisions relating to one class of movements do not necessarily apply to the other.

4. The questions involved in this proceeding relate solely to the air-brake provisions of the act, and necessitate a consideration of what class of movements on a railroad constitute the *running* of a *train* within the meaning of the act.

5. Movements of engines and cars on a railroad track consist of two general classes, to wit, "main-line movements"

and "switching operations." It is conceded that the air-brake provisions of the safety appliance act apply to the former, but it is asserted that they do not and cannot apply to the latter.

6. It is conceded by the Government, the courts, and the Interstate Commerce Commission that the air-brake provisions of the act cannot be applied to "ordinary switching operations," but the Government contends that they should be applied to switching operations of an extended character, as in the case at bar.

7. No logical reason is advanced by the Government for applying the air-brake provisions of the act to extended switching operations when they are not and concededly cannot be applied to ordinary switching operations.

8. Movements of the character in question do not come within the specific terms of the act or within the spirit of language and terms of the act as a whole.

9. The movements in question do not come within the meaning of the word "train" as used in the act, and are not so described by railroad men, but are described and referred to by them as "drags" or "cuts" of cars.

10. The purpose, scope, and object of the act necessarily excludes the application of the air-brake provisions to switching movements of any kind or character.

11. The application of the air-brake provisions of the act to switching operations of any kind or character would lead to oppressive and unjust results, and this was not intended.

12. The act has not been construed by those entrusted with the enforcement thereof so as to include switching operations.

13. The appellate courts have almost unanimously declared that the air-brake provisions of the act were not intended to relate to switching operations of any kind.

14. If there is any question under the evidence whether the movements involved were switching operations, and we assert that there is none, then this question at least should

have been submitted to the jury, by the instructions requested.

15. The movements involved in the case at bar were distinctly switching movements in every particular, even more so than in the Erie case (212 Fed., 853), and much more so than in the Santa Fe case (198 Fed., 673).

We again respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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UNITED STATES *v.* CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 630. Argued January 7, 8, 1915.—Decided May 10, 1915.

Railroad yards belonging to the same railroad but several miles apart, such as those of the Chicago, Burlington & Quincy Railway at Kansas City on opposite sides of the Missouri River, are not actually one yard, and trains moving between them are not engaged merely in switching operations, but are engaged in transportation within the purview of the air-brake provision of the Safety Appliance Act.

211 Fed. Rep. 127, reversed.

THE facts, which involve the construction and application of the Safety Appliance Acts, are stated in the opinion.

Mr. Assistant Attorney General Underwood for the United States.

Mr. H. M. Langworthy, with whom *Mr. William Warner*, *Mr. O. H. Dean*, *Mr. W. D. McLeod* and *Mr. O. M. Spencer* were on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action for penalties under the law of Congress relating to safety appliances. Four violations were charged. One consisted in using a car with a defective coupler and the others in running certain transfer trains without having the requisite percentage of air brakes so connected that they could be operated by the engineer.

The first is no longer in controversy. As to the others the controverted question at the trial was not whether the air-brake requirement, if applicable, was violated, but whether it applied to such trains. The District Court, deeming the requirement applicable, directed a verdict and entered a judgment for the Government, and the Circuit Court of Appeals, being of a different opinion, reversed the judgment, one judge dissenting. 211 Fed. Rep. 12. A writ of certiorari granted under § 262 of the Judicial Code brings the case here.

The facts disclosed by the evidence are these: The defendant operates a railroad which passes through Kansas City, Missouri, and is used largely in interstate commerce. Among its terminal facilities at that point are two freight yards known as the Twelfth Street yard and the Murray yard. These yards are on opposite sides of the Missouri River, the distance between their nearest points being about two miles. The track connecting them is one by which passenger and freight trains enter and leave the city, in other words, a main-line track. For a distance of 3,000 feet it is upon a single track bridge spanning the river, and off the bridge it intersects at grade twelve or fifteen tracks of other companies and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash railroads enter and leave the city.

Both yards are used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing and distributing cars. To reach their ultimate destinations, whether on the defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other, and this is accomplished by transfer trains which are run over the main-line track connecting the yards. These

trains usually consist of an engine and about thirty-five cars, are operated by what are termed yard or switching crews, and carry no caboose or markers. They have no fixed schedules and are not controlled by a train dispatcher but by block signals, as are all other trains moving over the same track. Each train is moved as a unit from one yard to the other and not infrequently is both preceded and followed by other trains, passenger and freight.

The three trains, the running of which is charged to have been violative of the statute, were transfer trains of the class just described. They were run from one yard to the other on August 9, 1910, and were composed respectively of 42, 36 and 39 cars, of which only 9 in one train and 10 in each of the others had their air brakes connected for use by the engineer. At that time air brakes were required to be used on 75 per cent. of the cars in a train. 11 I. C. C. 429, 437.

Giving effect to the views quite recently expressed in *United States* v. *Erie Railroad Company*, *ante*, p. 402, we think these trains came within the air-brake requirement, which the amendatory act of 1903 declares "shall be held to apply to all trains . . . on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally de-

signed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it.

The judgment of the Circuit Court of Appeals must therefore be reversed and that of the District Court affirmed.

It is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.